(13)

23 Orig.

IN THE

Supreme Court of the United States

STATE OF MARYLAND

versus

MORRIS A. SOPER, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND, AND THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

CASE "A".

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS, PETITION FOR WRIT OF MANDAMUS AND EXHIBITS.

1, 28, 30 (4)

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In The

Supreme Court of the United States

IN THE MATTER OF THE APPLICATION OF THE STATE OF MARYLAND FOR A WRIT OF MANDAMUS DIRECTED TO THE HONORABLE, MORRIS A. SOPER, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND, AND DIRECTED ALSO TO SAID COURT.

CASE "A".

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS.

Mr. Clerk:

Please file.

THOS. H. ROBINSON,
Attorney General of Maryland,

HERBERT LEVY,
Assistant Attorney General of Maryland,
Attorneys for the State of Maryland.

STATE OF MARYLAND *vs.* MORRIS A. SOPER, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND, AND THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.	IN THE SUPREME COURT OF THE UNITED STATES.

CASE "A".

To the Honorable, William Howard Taft, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Now comes the petitioner, the State of Maryland, by Albert C. Ritchie, its Governor, and moves the Court for leave to file the petition for writ of mandamus hereto annexed; and further moves that an order and rule be entered and issued directing Morris A. Soper, Judge of the District Court of the United States for the District of Maryland, and also directing the said District Court to show cause why a writ of mandamus should not issue against them and each of them in accordance with the prayer of said petition, and why your petitioner should not have such relief and such other and further relief in the premises as may be just and meet.

THOS. H. ROBINSON,
Attorney General of Maryland,

HERBERT LEVY,
Assistant Attorney General of Maryland,
Attorneys for Petitioner.

IN THE

Supreme Court of the United States

IN THE MATTER OF THE APPLICATION OF THE STATE OF MARYLAND FOR A WRIT OF MANDAMUS DIRECTED TO THE HONORABLE, MORRIS A. SOPER, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND, AND DIRECTED ALSO TO SAID COURT.

CASE "A".

PETITION FOR WRIT OF MANDAMUS.

MR. CLERK:

Please file.

THOS. H. ROBINSON,
Attorney General of Maryland,

HERBERT LEVY,
Assistant Attorney General of Maryland,
Attorneys for the State of Maryland.

STATE OF MARYLAND *vs.* MORRIS A. SOPER, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND, AND THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.	IN THE SUPREME COURT OF THE UNITED STATES.

CASE "A".

To the Honorable, William Howard Taft, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, the State of Maryland, by Albert C. Ritchie, its Governor, respectfully shows unto your Honors that the jurisdiction of the Circuit Court for Harford County, a Court clothed by the Constitution and laws of the State of Maryland with original criminal jurisdiction, has been invaded by Morris A. Soper, Judge of the District Court of the United States for the District of Maryland, and by the said District Court, whose acts and doings complained of are as follows, to wit:

1. On the 10th day of February, 1925, Robert D. Ford, John M. Barton, E. Franklin Ely, Wilton L. Stevens and William Trabing were indicted in the Circuit Court for Harford County, State of Maryland, for the murder, on or about the 19th day of November, 1924, of one Lawrence Wenger, a citizen of the State of Maryland. On the 11th day of February, 1925, said Judge, Morris A. Soper, and the

said District Court, issued an order, directed to the Circuit Court for Harford County and the Judge and the Clerk thereof, whereby he caused the said prosecution, styled "State of Maryland vs. Robert D. Ford, John M. Barton, E. Franklin Ely, Wilton L. Stevens and William Trabing," to be removed from the Circuit Court for Harford County to the District Court of the United States for the District of Maryland, upon the supposed authority of *Section 33 of the Judicial Code (U. S. Comp. St., Sec. 1015, being Judicial Code, Sec. 33, as amended, Act Aug. 23, 1916, c. 99)*. The petition, upon which the said removal was granted, alleged that on the day when the murder is alleged to have been committed, "the petitioner William Trabing was a chauffeur of the Reliable Transfer Company, and was at the time above mentioned, engaged and employed by Edmund Budnitz, the Federal Prohibition Director of the State of Maryland, in the capacity of a chauffeur for Federal Prohibition Agents, Robert D. Ford, John M. Barton, Wilton L. Stevens and E. Franklin Ely, all being officers of the Internal Revenue Service of the United States; that the said petitioner, William Trabing, was at the said time a person acting under and by authority of the said Federal Prohibition Director, Edmund Budnitz and the said Federal Prohibition Agents, Robert D. Ford, John M. Barton, Wilton L. Stevens and E. Franklin Ely, and that the said agents were on November 19th, 1924, and now are Federal Prohibition Agents of the Bureau of Internal Revenue of the Treasury Department of the United States." *For convenience, however, all of the said petitioners will be hereafter designated as "Federal Prohibition Agents."*

2. Upon said petition, the said Judge, Morris A. Soper, by "writ of habeas corpus cum causa," also took the bodies of the aforesaid Federal Prohibition Agents from the custody of the jailor of Harford County, and let said Federal Prohibition Agents to bail.

3. After the record of the proceedings of the Circuit Court for Harford County was filed in the said District Court of the United States for the District of Maryland, the State of Maryland, on the 12th day of March, 1925, appeared specially in the said District Court, held at Baltimore, Maryland, and moved the said Court to quash the writ and rescind the order issued by the said District Court on the 11th day of February, 1925, as aforesaid, and to remand the said case to the Circuit Court for Harford County, for the following reasons:

(a) Because the allegations of the petition for removal failed to disclose a state of facts entitling the Federal Prohibition Agents to have the said writ issued.

(b) Because the allegations set forth in said petition were contradictory, evasive, founded on hearsay and in part untrue.

(c) Because the issuance of said writ upon the allegations of said petition and the certificate of counsel attached thereto was beyond the power and jurisdiction of the said District Court as limited by the Constitution and laws of the United States.

(d) Because the said writ, if allowed to stand, constituted an interference by the said District Court with the due and orderly administration of justice in the Circuit Court for Harford County, contrary to the Constitution and laws of the United States.

(e) Because there was no allegation in the petition that authorized the said District Court to issue any writ whatsoever against the Judge or the Clerk of the Circuit Court for Harford County.

4. The said motion to remand was fully argued before the said Judge of the said District Court on the 17th day

of March, 1925, and on the same day the said Judge, being of the opinion that the said petition for removal was defective, upon application by the United States on behalf of the said Federal Prohibition Agents, granted leave to the United States to amend said petition for removal.

5. Thereafter, to wit, on the 31st day of March, 1925, the said Federal Prohibition Agents filed their amended petition in said cause, pursuant to the leave granted them by the aforesaid order of March 17th, 1925, whereupon the State of Maryland again appeared specially in said cause and again moved to quash the writ and rescind the order of February 11th, 1925, and to remand the said case to the Circuit Court for Harford County, and assigned substantially the same reasons for the said "motion to quash and remand" as those set forth in its "motion to quash and remand" filed in reply to the original petition for removal, as aforesaid.

6. On the 5th day of May, 1925, after a second hearing the said Judge and the said Court denied the motion to remand the case to the Circuit Court for Harford County, and ratified and confirmed the order of February 11th, 1925, removing the said cause to the said District Court from the Circuit Court for Harford County.

7. Your petitioner files with its petition, and prays to be taken as part and parcel hereof, a certified copy of the record in "State of Maryland vs. Robert D. Ford, John M. Barton, E. Franklin Ely, Wilton L. Stevens and William Trabing," in the District Court of the United States for the District of Maryland, marked "Exhibit A," and a certified copy of the record in "State of Maryland vs. Robert D. Ford, John M. Barton, E. Franklin Ely, Wilton L. Stevens and William Trabing," in the Circuit Court for Harford County, marked "Exhibit B."

8. Your petitioner avers and charges that the action and conduct of Judge Soper were a gross violation of the Constitution and laws of Maryland and of the Constitution and laws of the United States, because neither the said District Court of the United States for the District of Maryland nor Judge Soper had jurisdiction over the case unlawfully removed by the said Judge Soper, as aforesaid. The prosecuiton is in the name of your petitioner; the crime —murder—was committed within its territorial limits by said Federal Prohibition Agents upon one Lawrence Wenger, its citizen.

9. Your petitioner alleges that Judge Soper was not authorized to remove the said prosecution, under *Section 33 of the Judicial Code,* upon the allegations of the original petition for removal, because (*inter alia*):

(a) Federal Prohibition Agents are not officers "appointed under or acting by authority of any Revenue Law of the United States" or persons "acting under or by authority of any such officer," within the meaning of *Section 33 of the Judicial Code.*

(b) Said petition does not show that the criminal prosecution pending in the Circuit Court for Harford County was on account of any act done under color of the office of the defendants in said prosecution, or under color of any Revenue Law of the United States, or on account of any right, title or authority claimed by the said defendants under any Revenue Law of the United States, within the meaning of said *Section 33 of the Judicial Code.*

(c) The said petition does not set forth any facts to show that the prosecution for murder arose out of the discharge of the official duties of the petitioners, as Federal Prohibition Agents, or in the discharge of their duties under the National Prohibition Law, or that the said prosecution

grew out of an effort on the part of said Federal Prohibition Agents to protect themselves and each other in the discharge of their duty.

(d) The said petition does not allege any facts to show that the prosecution grew out of the performance by the said petitioners of their official duties as Federal Prohibition Agents in making and attempting to make an investigation of any violation of the National Prohibition Law by Lawrence Wenger, the deceased, and further does not allege that the said Lawrence Wenger had committed or was suspected to having committed any violation of said National Prohibition Law.

10. Your petitioner avers that the murder of the said Lawrence Wenger by the said Federal Prohibition Agents was wanton, wilful, deliberate, premeditated and without any justification whatsoever, and that the said Federal Prohibition Agents not only failed to set up any facts to show that said prosecution grew out of an act done by them under color of their office or of any Revenue Law, but, on the contrary, their original petition for removal denies that they were in any manner responsible, lawfully or otherwise, for the homicide of the said Lawrence Wenger.

11. Your petitioner further avers that the amended petition for removal is also defective and insufficient for the following reasons:

(a) It alleges that the said Federal Prohibition Agents were acting under the direction of the Commsisioner of Internal Revenue, the Federal Prohibition Commissioner and the Federal Prohibition Director for the State of Maryland, and were acting under the authority of and for the purpose of enforcing the National Prohibition Act and acts supplemental thereto and all Internal Revenue Laws relating to

the manufacture, sale, transportation, control and taxation of intoxicating liquors, with authority to execute and perform all the duties delegated to such officers by law, and that at the time of the act alleged to have been done by them, they were engaged in the discharge of their official duties as Federal Prohibition Officers, in making and attempting to make an investigation concerning a violation of the National Prohibition Act and other Internal Revenue Laws and in reporting the result of said investigation and in protecting themselves in the discharge of their duty, but said amended petition does not specify the connection, if any, of the said Lawrence Wenger, deceased, with the breach of the provisions of the National Prohibition Act or other Internal Revenue laws, which they were investigating, or any other facts tending to show that the prosecution, which they sought to remove, grew out of any act done under color of their office or of any such law.

(b) Taken in connection with the allegations of the original petition, the amended petition clearly shows that in the investigation which the said Federal Prohibition Agents claim to have been making at the time of the acts and happenings for which they were indicted they were acting in the capacity of Federal Prohibition Officers under the National Prohibition Law, and as such, they were not "Revenue Officers" and are not entitled to have the prosecution against them removed to the Federal Court under the provisions of *Section 33 of the Judicial Code.*

(c) *Section 28 of Title II of the National Prohibition Act,* upon which the amended petition relies as additional authority for the removal of the prosecution, does not, either in its letter or spirit, authorize the removal of a criminal prosecution pending in a State Court against a Federal Prohibition Agent.

(d) The statement in the amended petition of the facts alleged to bring the prosecution within the provisions of *Section 33 of the Judicial Code,* clearly negatives the contention of the said Federal Prohibition Agents that the prosecution arose out of any act done under color of their office or of the Revenue Laws and Prohibition Laws of the United States. Said amended petition goes into great detail with reference to the investigation which the said Federal Prohibition Agents were carrying on in Harford County, but it does not point out that the said investigation or any act done in pursuance thereof resulted in the prosecution sought to be removed. On the contrary, the amended petition specifically alleges that the said Federal Prohibition Agents were returning to Baltimore to report to the office of the Maryland Federal Prohibition Director concerning the result of their investigation when they discovered the said Lawrence Wenger, mortally wounded and lying beside the path along which they were walking. They deny they were in any manner responsible, either lawfully or unlawfully, for the homicide of the said Lawrence Wenger, or that they had any knowledge of how the said Wenger came to his death, and in view of this denial, it is inconceivable that the prosecution against them, based as it was upon said homicide, could have arisen on account of any act done by them under color of their office or of any Revenue Law or Prohibition Law of the United States.

(e) *Section 33 of the Judicial Code* does not contemplate that the officers mentioned therein should be entitled to remove all causes or prosecutions brought against them during their tenure of office merely by reason of their holding said offices, but said act only applies to those actions and prosecutions which arise out of any act done under color of their office or the law under which they are acting, or on account of any right, title or authority claimed by such officers or other persons under any such law.

12. Your petitioner alleges that the constitution does not confer upon Congress authority to define and punish crimes against the State; that to permit such intervention by the Federal power, your petitioner charges would be the utter and complete destruction of the State sovereignty and State automony.

13. Your petitioner is advised that murder is a common law offense; that Federal Courts have no common law jurisdiction in criminal cases; therefore, the trial of the case of "State of Maryland vs. Robert D. Ford, John M. Barton, E. Franklin Ely, Wilton L. Stevens and William Trabing" must be held in the Circuit Court for Harford County, which Court only has jurisdiction, and your petitioner charges that Judge Soper by removing the said case from the Circuit Court for Harford County to the District Court of the United States for the District of Maryland, and taking the said Federal Prohibition Agents from the custody of the jailor of said county, acted not only without authority and sanction of law, but in violation of law, and his every act and order are null and void and should be so adjudged.

14. Your petitioner further avers that in the prosecution aforesaid, no Federal question is involved; and that the original and amended petitions for removal filed by the said Robert D. Ford, John M. Barton, E. Franklin Ely, Wilton L. Stevens and William Trabing pleaded no right or privilege conferred by the Constitution and laws of the United States.

15. Your petitioner is advised that the said Judge, Morris A. Soper, in removing the said case and in refusing to remand the same upon the application of your petitioner, has transcended the jurisdiction of his Court and has undertaken the exercise of powers not vested in him or his Court by any law of the United States.

16. Your petitioner is informed and believes and charges that it is the intention of the said Judge, Morris A. Soper, by color of his office as Judge aforesaid, to try the said Federal Prohibition Agents in the District Court of the United States for the District of Maryland at the present term of said Court, now being held in the City of Baltimore, for the offense aforesaid, committed against the laws of the State of Maryland, and thereby violate the Constitution of Maryland, set aside its laws and usurp the jurisdiction of its Courts.

Your petitioner, therefore, prays that a rule may be awarded by this Court requiring the said Morris A. Soper, Judge of the District Court of the United States for the District of Maryland, and the said District Court to show cause why a mandamus should not be issued, forbidding and preventing the said Judge and the said Court from taking cognizance of said case, and from any, all and every act connected with said trial, and commanding them to remand the said case to the Circuit Court for Harford County and to redeliver to the jailor of said Harford County the bodies of the said Federal Prohibition Agents, to be dealt with according to the laws of the said State.

And as in duty bound, etc.

ALBERT C. RITCHIE,
Governor of Maryland.

THOS. H. ROBINSON,
Attorney General of Maryland,

HERBERT LEVY,
Assistant Attorney General of Maryland,
Attorneys for the State of Maryland.

STATE OF MARYLAND,

CITY OF BALTIMORE, to wit:

I HEREBY CERTIFY, that on this twenty-fourth day of September, 1925, before me the subscriber, a Notary Public of the State of Maryland, in and for Baltimore City aforesaid, personally appeared Albert C. Ritchie, Governor of the State of Maryland, and made oath that the allegations contained in the petition for mandamus hereto annexed are true to the best of his knowledge, information and belief.

WITNESS My hand and Notarial Seal.

(Notarial Seal.) ANNA DAVIS GREER,
Notary Public.

IN THE

Supreme Court of the United States

IN THE MATTER OF THE APPLICATION OF THE STATE OF MARYLAND FOR A WRIT OF MANDAMUS DIRECTED TO THE HONORABLE, MORRIS A. SOPER, JUDGE OF THE DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AND DIRECTED ALSO TO SAID DISTRICT COURT.

CASE "A."

EXHIBIT A.

MR. CLERK:

Please file.

THOS. H. ROBINSON,

Attorney General for the State of Maryland.

HERBERT LEVY,

Asst. Attorney General of the State of Maryland.

EXHIBIT A.

STATE OF MARYLAND *vs.* ROBERT D. FORD, E. FRANK ELY, JOHN M. BARTON, WILTON L. STEVENS and WILLIAM TRABING.	IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND. No. 7189 Criminal.

DOCKET ENTRIES.

1925.

Feby. 11—Petition of Defendants for removal of case from Criminal Court of Harford County and for a Writ of Habeas Corpus Cum Causa and Order of Court directing Writ of Habeas Corpus Cum Causa to issue to the Criminal Court of Harford County filed.

Feby. 11—Writ of Habeas Corpus Cum Causa retble within ten days issued. Copy of Writ, Copy Petition and Order sent to Marshal to be served. (Copy of Writ and Petition and Order served on J. H. Bradford, Deputy Clerk, Circuit Court for Harford County, at Belair, Md., 12 February, 1925.)

Feby. 12—Defendants John M. Barton, Wilton L. Stevens, E. Frank Ely and William Trabing each recognized in sum of Ten Thousand Dollars with John W. Famous, John W. Galbreath, James R. Galbreath and William B. Taylor in same

amount as to each recognizor for their appearance from day to day as required to answer the charge in this case.

Feby. 13—Defendant Robert D. Ford recognized in sum of Ten Thousand Dollars with Albert G. Buffington and Jesse H. Bratten in same amount for his appearance from day to day as required to answer the charge in this case.

Feby. 21—Record of Proceedings of Circuit Court for Harford County filed.

Mch. 12—Motion to Quash Writ and rescind Order of Court filed.

Mch. 17—Order of Court granting leave to the United State to amend its petition filed.

Mch. 31—Amended Petition of Defendants for removal of Case from Criminal Court of Harford County and for a Writ of Habeas Corpus Cum Causa filed.

April 11—Motion to Quash and remand Indictment for Murder on Amended Petition filed.

May 5—Order of Court overruling Motion to Quash and remand filed.

May 5—Stipulation filed.

PETITION FOR REMOVAL AND ORDER OF COURT THEREON.

Filed February 11, 1925.

STATE OF MARYLAND *vs.* ROBERT D. FORD, JOHN M. BARTON, E. FRANK ELY, WILTON L. STEVENS and WILLIAM TRABING.	IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

To the Honorable, the Judge of said Court:

The Petition of Robert D. Ford, John M. Barton, E. Frank Ely, Wilton L. Stevens and William Trabing, respectfully represents:

1. That on or about the tenth day of February, in the year of our Lord, nineteen hundred and twenty-five, an indictment was returned into the Criminal Court for Harford County, State of Maryland, by a Grand Jury of the said Court, which indictment charged your Petitioners with the crime of murder, contrary to the laws of the State of Maryland, by reason of the fact that on or about the nineteenth day of November, nineteen hundred and twenty-four, it is alleged that your petitioner unlawfully and feloniously did murder one Lawrence Wenger.

2. That on the nineteenth day of November, nineteen hundred and twenty-four, the petitioner William Trabing was a chauffeur of the Reliable Transfer Company and was at the time above mentioned engaged and employed by Edmund Budnitz, Federal Prohibition Director of the State

of Maryland, in the capacity of a chauffeur for Federal Prohibition Agents, Robert D. Ford, John M. Barton, Wilton L. Stevens and E. Frank Ely, all being officers of the Internal Revenue Service of the United States; that the said Petitioner William Trabing was at the said time a person acting under and by authority of the said Prohibition Director Edmund Budnitz and the said Federal Prohibition Agents Robert D. Ford, John M. Barton, Wilton L. Stevens and E. Frank Ely; and that the said agents were on November 19, 1924, and now are Federal Prohibition Agents of the Bureau of Internal Revenue for the Treasury Department of the United States.

3. That the act or acts done by the Petitioner William Trabing, at the time when they are alleged to have been guilty of the murder of one Lawrence Wenger, which charge he denies was done by him while acting under and by authority of Federal Prohibition Director Edmund Budnitz and Federal Prohibition Officers Robert D. Ford, John M. Barton, Wilton L. Stevens and E. Frank Ely, in the discharge of their official duties as Prohibition Agents as aforesaid and in discharge of his duty as chauffeur and helper of the said agents in making and attempting to make an investigation in the discharge of their duty and of his duty as aforesaid and in protecting himself and the said officers of the Internal Revenue in the discharge of his and their duty.

4. That the act or acts done by the Petitioners Robert D. Ford, John M. Barton, Wilton L. Stevens and E. Frank Ely, at the time when they are alleged to have been guilty of the murder of Lawrence Wenger, which charge they deny, was done by them in the discharge of their official duties as Prohibition Agents as aforesaid in making and attempting to make an investigation in the discharge of their duties as aforesaid and in protecting themselves as

fellow officers of the Internal Revenue in the discharge of their duty.

5. That the said criminal prosecution commenced by said indictment is now pending in the Criminal Court for Harford County and is a criminal prosecution on account of the acts alleged to have been done by your petitioners in the course of the performance of their duties as Federal Prohibition Agents, which acts they deny having done.

WHEREFORE, your Petitioners pray that the said suit may be removed from the Criminal Court for Harford County, aforesaid, to this Honorable Court and that writs of certiorari and habeas corpus cum causa issue for that purpose pursuant to the statute of the United States in such case made and provided. (U. S. Compiled Statutes, Sec. 1015, being Judicial Code, Sec. 33, as amended, Act August 23, 1916, C. 399.)

E. FRANK ELY,

JOHN M. BARTON,

WILTON L. STEVENS,

WILLIAM M. TRABING,

ROBERT D. FORD,

By A. W. W. WOODCOCK,

United States Attorney for the
District of Maryland.

2/11/25.

UNITED STATES OF AMERICA, DISTRICT OF MARYLAND, TO WIT:

I Hereby Certify, that before me, the undersigned, personally appeared John M. Barton, E. Frank Ely, Wilton

L. Stevens, Federal Prohibition Agents, William Trabing, chauffeur for the said agents, and Amos W. W. Woodcock, United States Attorney for the District of Maryland, and made oath in due form of law that they are the persons whose names are subscribed to the aforegoing petition, and that they have read the petition, and the matters contained therein are true in substance and in fact.

CHAS. W. ZIMMERMANN,

Chief Deputy Clerk of the District Court of the United States for the District of Maryland.

I, A. W. W. Woodcock, United States Attorney in and for the District of Maryland, Do Hereby Certify that, as attorney for the petitioners named above, I have examined the proceedings against them mentioned in the aforegoing petition and have carefully inquired into all the matters set forth in the said petition and I believe the same to be true.

A. W. W. WOODCOCK,

United States Attorney.

ORDER.

Upon motion of A. W. W. Woodcock, United States Attorney, attorney for Robert D. Ford, John M. Barton, E. Frank Ely, Wilton L. Stevens and William Trabing, and on filing the petition of the said Robert D. Ford, John M. Barton, E. Frank Ely, Wilton L. Stevens and William Trabing, praying for the removal to this Court from the Criminal Court of Harford County, in the State of Maryland, in the criminal prosecution for murder against the

said Robert D. Ford, John M. Barton, E. Frank Ely, Wilton L. Stevens and William Trabing in said Court, entitled State of Maryland versus Robert D. Ford, John M. Barton, E. Frank Ely, Wilton L. Stevens and William Trabing, and for the issuance of writs of certiorari and habeas corpus cum causa for that purpose, pursuant to Section 33 of the Judicial Code of the United States, and the Court having read said petition, it is ORDERED this eleventh day of February, nineteen hundred and twenty-five, that writs of certiorari and habeas corpus cum causa issue herein directed to the said Court requiring said Court to transmit to this Court within ten days the record and proceedings in said case.

MORRIS A. SOPER,

United States District Judge, United States District Court for the District of Maryland.

ORDER OF REMOVAL, WRIT OF CERTIORARI AND HABEAS CORPUS CUM CAUSA.

Issued February 11, 1925.

STATE OF MARYLAND *vs.* ROBERT D. FORD, JOHN M. BARTON, E. FRANK ELY, WILTON L. STEVENS and WILLIAM TRABING.	IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

To the Honorable, the Circuit Court of Harford County in the State of Maryland, the Judge of the Said Court and the Clerk of the Said Court, Greeting:

Being informed that there is now pending before you a suit in which the State of Maryland is plaintiff and Robert D. Ford, John M. Barton, E. Frank Ely, Wilton L. Stevens and William Trabing are the defendants, which said suit is a criminal prosecution against the said Robert D. Ford, John M. Barton, E. Frank Ely, Wilton L. Stevens and William Trabing, charging the defendants with the murder of Lawrence Wenger, the said suit arising out of facts which occurred while the said William Trabing was discharging his duties as chauffeur and helper of the Prohibition Agents, Officers of the Internal Revenue, the co-defendants, and acting in and by authority of Federal Prohibition Director Edmund Budnitz and Federal Prohibition Officers Robert D. Ford, John M. Barton, Wilton L. Stevens and E. Frank Ely, who were acting in the discharge of their official duties as Prohibition Agents, Officers of the Internal Revenue Service of the United States as aforesaid in making and attempting to make an investigation in the

discharge of their duty and in protecting themselves in the discharge of their duty under the National Prohibition Act of the said United States; and which said suit has not yet been heard and determined.

Now, therefore, we being willing that said cause and the records and proceedings therein should be certified by said Judge of the Circuit Court of Harford County in the State of Maryland, do hereby command you that you immediately deliver the bodies of Robert D. Ford, John M. Barton, E. Frank Ely, Wilton L. Stevens and William Trabing to the custody of the United States Marshal to be dealt with in this cause according to law and the order of the District Court for the District of Maryland; and that you send, without delay and within ten days to the District Court of the United States, the records and proceedings in said cause so that the said District Court of the United States may act thereon as of right and according to the laws and customs of the said United States, among others, Section 1015 of the United States Compiled Statutes, being Judicial Code, Sec. 33, as amended by its Act of August 23, 1916, C. 399.

WITNESS the Honorable Morris A. Soper, Judge of said District Court of the United States, this eleventh day of February, A. D. nineteen hundred and twenty-five.

ARTHUR L. SPAMER,
Clerk of the District Court of the United
(Seal.) States for the District of Maryland.

The foregoing Writ is thus endorsed:

"Copy of within Writ of Habeas Corpus Cum Causa and Copy Petition for and Order of Removal, left with J. H. Bradford, Deputy Clerk, Circuit Court of Harford County, at Belair, Md., 12th day of February, 1925.

GEORGE W. COLLIER,
United States Marshal,
District of Maryland,
By: GEO. H. EDELEN,
Chief Deputy Marshal."

MOTION TO QUASH AND REMAND.

Filed March 12, 1925.

STATE OF MARYLAND *vs.* ROBERT D. FORD, JOHN M. BARTON, E. FRANKLIN ELY, WILTON L. STEVENS and WILLIAM TRABING.	IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND. (INDICTMENT FOR MURDER.)

To the Honorable, Morris A. Soper, Judge of said Court:

The State of Maryland, by Thomas H. Robinson, its Attorney General, and W. Worthington Hopkins, State's Attorney for Harford County, who appear specially for the purposes of this motion, and for no other purpose, move this Honorable Court to quash the writ and rescind the order issued in the above entitled case, directed to the Judge of the Circuit Court for Harford County, and the Clerk thereof, and to remand the said case to the Circuit Court for Harford County, for the following reasons:

(1) Because the allegations of the petition filed in this case do not disclose a state of facts entitling the petitioners to have said writ issued, or the charge against them removed into this Court.

(2) Because the allegations set forth in said petition are contradictory, evasive, founded on hearsay, and in part untrue.

(3) Because the issuance of said writ upon the allegations of said petition and attached certificate of counsel is

beyond the power and jurisdiction of this Court as limited by the Constitution and laws of the United States.

(4) Because the said writ, if allowed to stand, constitutes an interference by this Court with the due and orderly administration of justice in the Circuit Court for Harford County contrary to the Constitution and laws of the United States.

(5) Because there is no allegation in said petition that authorizes this Court to issue any writ whatsoever against the Judge or the Clerk of the Circuit Court for Harford County.

(6) And for other good and sufficient reasons to be shown at the hearing.

THOS. H. ROBINSON,

Attorney General of Maryland.

W. WORTHINGTON HOPKINS,

State's Attorney for Harford County.

ORDER GRANTING LEAVE TO AMEND PETITION.

Filed May 17, 1925.

STATE OF MARYLAND *vs.* ROBERT D. FORD, JOHN M. BARTON, E. FRANKLIN ELY, WILTON L. STEVENS and WILLIAM TRABING.	IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND. INDICTMENT FOR MURDER.

This cause standing ready for hearing, and being submitted upon motion of the State of Maryland to quash the writ and rescind the order issued in the above entitled case on the 11th day of February, 1925, directed to the Judge of the Circuit Court for Harford County, and the Clerk thereof, and to remand the said case to the Circuit Court for Harford County, the counsel for the parties were heard and the proceedings were read and considered; and the United States having applied for leave of court to amend the petition, it is therefore ordered this 17th day of March, in the year 1925, by the District Court of the United States for the District of Maryland:

That leave be and it is hereby granted to the United States to amend said petition.

MORRIS A. SOPER,
United States District Judge.

AMENDED PETITION FOR REMOVAL AND ORDER OF COURT.

Filed March 31, 1925.

STATE OF MARYLAND *vs.* ROBERT D. FORD, JOHN M. BARTON, E. FRANKLIN ELY, WILTON L. STEVENS and WILLIAM TRABING.	IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

AMENDED PETITION.

To the Honorable, the Judge of said Court:

The Petition of Robert D. Ford, John M. Barton, E. Franklin Ely, Wilton L. Stevens and William Trabing, respectfully represents:

1. That on or about the tenth day of February, in the year of our Lord nineteen hundred and twenty-five, an indictment was returned in the Circuit Court of the Third Judicial Circuit of the State of Maryland by the Grand Inquest of the State of Maryland for the body of Harford County, which indictment charged your Petitioners with the crime of murder, as follows:

"The Jurors of the State of Maryland, for the body of Harford County, do on their oath present that Wilton L. Stevens, John M. Barton, Robert D. Ford, E. Franklin Ely, and William Trabing, late of Harford County aforesaid, on the nineteenth day of November in the year of our Lord

nineteen hundred and twenty-four, at the County aforesaid, feloniously, wilfully, and of their deliberate premeditated malice aforethought did kill and murder Lawrence Wenger; contrary to the form of the Act of Assembly in such case made and provided; and against the peace, government, and dignity of the State.

W. Worthington Hopkins,

State's Attorney for Harford County."

2. That on the twentieth day of November, nineteen hundred and twenty-four, the Petitioner William Trabing was a chauffeur of the Reliable Transfer Company and was at the time mentioned engaged and employed by Edmund Budnitz, Federal Prohibition Director of the State of Maryland, in the capacity of a chauffeur for Federal Prohibition Agents Robert D. Ford, John M. Barton, Wilton L. Stevens and E. Franklin Ely, all being officers of the Bureau of Internal Revenue of the Treasury Department of the United States, to act under the direction of the Commissioner of Internal Revenue, the Federal Prohibition Commissioner, and the Federal Prohibition Director for the State of Maryland, and to act under the authority of and to enforce the National Prohibition Act and acts supplemental thereto and all Internal Revenue Laws relating to the manufacture, sale, transportation, control, and taxation of intoxicating liquors, with authority to execute and perform all the duties delegated to such officers by law.

3. That the acts alleged to have been done by the Petitioner William Trabing are alleged to have been done at a time when he was engaged in the discharge of his duties while acting under and by authority of Federal Prohibition Director Edmund Budnitz and Federal Prohibition Officers Robert D. Ford, John M. Barton, Wilton L. Stevens and E. Franklin Ely, as aforesaid, while the said officers

were engaged in the discharge of their official duties as prohibition officers in making and attempting to make an investigation concerning a violation of the National Prohibition Act and other Internal Revenue Laws and while reporting and preparing to report the results of said investigation and in protecting himself and the said officers of the Internal Revenue in the discharge of his and their duty as set out in Paragraph 4 below.

4. That the acts alleged to have been done by the Petitioners Robert D. Ford, John M. Barton, Wilton L. Stevens, and E. Franklin Ely are alleged to have been done at a time when they were engaged in the discharge of their official duties as Federal Prohibition Officers, and in making and attempting to make an investigation concerning a violation of the National Prohibition Act and other Internal Revenue Laws, and in reporting the results of said investigation, and in protecting themselves in the discharge of their duty as follows:

That on November nineteenth, nineteen hundred and twenty-four, your petitioners were directed by Maryland Federal Prohibition Director Edmund Budnitz to investigate the alleged unlawful distillation of intoxicating liquor on a farm known as the Harry Carver Farm situated approximately three miles from the village of Madonna, about twelve miles northwest from Bel Air, Maryland, which said property was then unoccupied. Your petitioners reached the said farm premises shortly after midday on November nineteenth, nineteen hundred and twenty-four, and discovered there in a secluded wooded valley and swamp materials for an illicit distilling operation, to wit, nine empty mash boxes, three fifty-gallon metal drums, a fifty-gallon condenser, about one thousand pounds of rye meal in bags, a lighted fire, and men's working clothes. Your petitioners thereupon concealed themselves in woods and shrubbery nearby the still site and shortly thereafter

became aware of the approach of a number of men bringing with them a still. Your petitioners thereupon made their presence known to the men who were approaching, and the men immediately dropped the still and fled; and though your petitioners pursued them across the fields, no one of the fleeing men was overtaken or arrested. Thereupon your petitioners returned to the still site, destroyed the materials above mentioned which constituted the unlawful distilling plant, and started to return to their car which had been left some distance from the still site, for the purpose of returning to Baltimore to report to the office of the Maryland Federal Prohibition Director concerning the results of their investigation, when they discovered a man, whom they afterwards learned to be one Lawrence Wegner, mortally wounded and lying beside the path along which they were walking, some 400 or 500 yards from the still site and in a direction opposite to that from which the unknown men had approached and towards which they fled. Whereupon your petitioners carried the wounded man to their car and took him to Jarrettsville, Maryland, for medical treatment, but, finding none there available, proceeded with all speed to Bel Air, where they sought out in turn Doctors Richardson, Sappington and Archer, without success, and finally placed the said Lawrence Wegner in charge of Doctor Van Bibber, who pronounced him dead. Your petitioners then, acting under the advice of the said Doctor Van Bibber, removed the body of the said Lawrence Wegner to the undertaking establishment of Dean and Foster in Bel Air. Your petitioners then proceeded to the State's Attorney's office in Bel Air and related the facts aforesaid to the State's Attorney; whereupon, on being informed by them that your petitioners Robert D. Ford, John M. Barton, Wilton L. Stevens, and E. Franklin Ely were prohibition officers and that your petitioner William Trabing was employed by the Federal Prohibition Director as their chauffeur, they were placed under arrest by the Sheriff of Harford County at the instance of the State's Attorney

and were confined in the Harford County Jail until the following morning, November twentieth, nineteen hundred and twenty-four. On the morning of November twentieth, nineteen hundred and twenty-four, your petitioners were taken by the Sheriff and State's Attorney, in company with a number of men who that afternoon served upon the Coroner's Jury mentioned in the indictment, and in company with two Baltimore City Police Headquarters Detectives, to the scene of their investigation of the previous day. They they related the facts concerning their investigation of the unlawful distilling operation and their finding of the said Lawrence Wenger on November nineteenth, and then and there went over the scene of the said occurrences, relating freely and without reservation the events which took place November nineteenth, in accordance with their duty as investigating and reporting officers of the Federal Government and in compliance with their duties as Federal Prohibition Officers. Likewise on the afternoon of November twentieth your petitioners were called before the Coroner's Inquest heretofore described in the indictment, and freely and without reservation in accordance with their duty as investigating and reporting officers of the Federal Government and acting under the direction of the Maryland Federal Prohibition Director, related the facts aforementioned. And thereupon they were again placed in the Harford County Jail and held for the action of the Harford County Grand Jury until their release on bail upon the evening of November twentieth, nineteen hundred and twenty-four, at the instance of the United States Attorney for the District of Maryland acting on their behalf.

5. That the said criminal prosecution was commenced in the manner following:

A presentment against your petitioners was returned in the Circuit Court for Harford County, February ninth, nineteen hundred and twenty-five, following which present-

ment the State of Maryland, by the State's Attorney for Harford County, prosecuted and sued forth out of the Circuit Court for Harford County a Writ of the State of Maryland of *Capias Ad Respondendum* against your petitioners, to which there was no return by the Sheriff of Harford County, whereupon the indictment heretofore set forth was returned.

The said indictment is now pending in the Circuit Court for Harford County and is a criminal prosecution on account of acts alleged to have been done by your petitioners at a time when they were engaged in the performance of their duties as Federal Prohibition Officers and chauffeur for Federal Prohibition Officers as set forth in aforegoing paragraphs.

WHEREFORE, your petitioners pray that the said suit may be removed from the Circuit Court for Harford County, aforesaid, to this Honorable Court and that writs of certiorari and habeas corpus cum causa may issue for that purpose pursuant to the Statute of the United States in such case made and provided. (U. S. Compiled Statutes, Sec. 1015, being Judicial Code, Sec. 33, as amended, Act August 23, 1916, C. 399; National Prohibition Act, Title II, Section 28.)

ROBERT D. FORD,

JOHN M. BARTON,

E. FRANKLIN ELY,

WILTON L. STEVENS,

WILLIAM M. TRABING,

By A. W. W. WOODCOCK,

United States Attorney for the District of Maryland.

3/30/25.

UNITED STATES OF AMERICA, DISTRICT OF MARYLAND, TO WIT:

I Hereby Certify that before me, the undersigned, personally appeared Robert D. Ford, John M. Barton, Wilton L. Stevens, E. Franklin Ely, Federal Prohibition Agents, and William Trabing, a chauffeur employed by the Federal Prohibition Director, and made oath in due form of law that they are the persons whose names are subscribed to the aforegoing petition, and that they have read the petition, and the matters contained therein are true in substance and in fact.

CHAS. W. ZIMMERMANN,

Chief Deputy Clerk of the District Court of the United States for the District of Maryland.

III-30-25.

I, A. W. W. Woodcock, United States Attorney in and for the District of Maryland, do hereby certify that, as attorney for the petitioners named above, I have examined the proceedings against them mentioned in the aforegoing petition and have carefully inquired into all the matters set forth in the said petition and I believe the same to be true.

A. W. W. WOODCOCK,

3/30/25. United States Attorney.

ORDER.

Upon motion of A. W. W. Woodcock, United States Attorney, Attorney for Robert D. Ford, John M. Barton, Wilton L. Stevens, E. Franklin Ely, and William Trabing, praying for the removal to this Court from the Circuit Court for Harford County in the State of Maryland, of the

Criminal Prosecution for Murder against the said Robert D. Ford, John M. Barton, Wilton L. Stevens, E. Franklin Ely, and William Trabing, and for the issuance of writs of certiorari and habeas corpus cum causa for that purpose, pursuant to Section 33 of the Judicial Code of the United States, and Section 28 of Title II of the National Prohibition Act, and the Court having read said petition, it is ORDERED, this thirty-first day of March, nineteen hundred and twenty-five, that writs of certiorari and habeas corpus cum causa issue herein directed to the said Court and to the Clerk of the said Court requiring them to transmit to this Court within ten days the records and proceedings in said case.

.....

United States District Judge, United States District Court for the District of Maryland.

MOTION TO QUASH AND REMAND ON AMENDED PETITION.

Filed April 11, 1925.

STATE OF MARYLAND *vs.* ROBERT D. FORD, JOHN M. BARTON, E. FRANKLIN ELY, WILTON L. STEVENS and WILLIAM TRABING.	IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND. (AMENDED PETITION.)

MOTION TO QUASH AND REMAND—INDICTMENT FOR MURDER.

To the Honorable, Morris A. Soper, Judge of said Court:

The State of Maryland, by Thomas H. Robinson, its Attorney General, and W. Worthington Hopkins, State's Attorney for Harford County, who appear specially for the purposes of this motion, and for no other purpose, moves this Honorable Court to quash the writ and rescind the order issued in the above entitled case, directed to the Judge of the Circuit Court for Harford County, and the Clerk thereof, and to remand the said case to the Circuit Court for Harford County, for the following reasons:

1. Because the allegations of the second paragraph of the amended petition are untrue.

2. Because the allegations of the petition filed in this case do not disclose a state of facts entitling the petitioners to have said writ issued or the charge against them removed into this Court.

~~3. Because the allegations set forth in said petition are contradictory, evasive, founded on hearsay, and in part untrue.~~

4. Because the issuance of said writ upon the allegations of said petition and attached certificate of counsel is beyond the power and jurisdiction of this Court as limited by the Constitution and laws of the United States.

5. Because the said writ, if allowed to stand, constitutes an interference by this Court with the due and orderly administration of justice in the Circuit Court or Harford County contrary to the Constitution and laws of the United States.

6. Because there is no allegation in said petition that authorizes this Court to issue any writ whatsoever against the Judge or the Clerk of the Circuit Court for Harford County.

7. And for other good and sufficient reasons to be shown at the hearing.

THOMAS H. ROBINSON,

Attorney General of Maryland.

W. WORTHINGTON HOPKINS,

State's Attorney for Harford County.

ORDER OVERRULING MOTION TO QUASH AND REMAND.

Filed May 5, 1925.

STATE OF MARYLAND *vs.* ROBERT D. FORD, JOHN M. BARTON, E. FRANKLIN ELY, WILTON L. STEVENS and WILLIAM TRABING.	IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND. INDICTMENT FOR MURDER.

This cause standing ready for hearing and being submitted upon motion of the State of Maryland to quash the writ and rescind the order issued in the above entitled case on the 11th day of February, 1925, directed to the Judge of the Circuit Court for Harford County, and the Clerk thereof, and to remand the said case to the Circuit Court for Harford County, the counsel for the parties were heard and the proceedings were read and considered.

It is, therefore, this 5th day of May, 1925, ordered by the District Court of the United States for the District of Maryland, that the said motion of the State of Maryland be and the same is hereby overruled, and that the removal of this cause to this Court from the Circuit Court for Harford County, in the State of Maryland, as directed by the said order of this Court dated February 11th, 1925, be and the same is hereby ratified and confirmed.

The United States District Court for the District of Maryland does further certify to the Supreme Court of the United States that the sole issue before the said District

Court of the United States for the District of Maryland in the said motion to quash and remand filed by the State of Maryland, was the jurisdiction of the said Court to remove this cause to said Court from the Circuit Court for Harford County, in the State of Maryland, and that in hereby ordering said removal, the said Court does hereby adjudicate said question of jurisdiction adversely to the State of Maryland.

MORRIS A. SOPER,

United States District Judge.

STIPULATION.

Filed May 5, 1925.

STATE OF MARYLAND *vs.* ROBERT D. FORD, JOHN M. BARTON, E. FRANKLIN ELY, WILTON L. STEVENS and WILLIAM TRABING.	IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND. INDICTMENT FOR MURDER.

It is stipulated by and between the parties hereto that Robert D. Ford, John M. Barton, Wilton L. Stevens and E. Franklin Ely, during the month of November, in the year 1924, and prior to said time, and at the time of the matters and facts charged in the indictment in the Circuit Court for Harford County, were Federal Prohibition Officers, holding a commission under the Commissioner of Internal Revenue and countersigned by the Federal Prohibition Commissioner, in the form following, that is to say:

"Date No.

THE UNITED STATES

TREASURY DEPARTMENT. INTERNAL REVENUE SERVICE.

This certifies that.....is hereby employed as a Federal Prohibition Officer to act under the authority of and to enforce the National Prohibition Act and Acts supplemental thereto and all Internal Revenue Laws, relating to the manufacture, sale, transportation, control, and taxation of intoxicating liquors, and he is hereby author-

ized to execute and perform all the duties delegated to such officers by law.

Countersigned:

.....	.....
Federal Prohibition Commissioner.	Commissioner of Internal Revenue.

This Commission is void if photograph of bearer does not appear above."

And that William Trabing was, at the time of the acts alleged in the indictment in the Circuit Court for Harford County, a chauffeur of the Reliable Transfer Company, engaged and employed by Edmund Budnitz, Federal Prohibition Director of the State of Maryland, in the capacity of chauffeur for the Prohibition Agents above named.

IN THE

Supreme Court of the United States

IN THE MATTER OF THE APPLICATION OF THE STATE OF MARYLAND FOR A WRIT OF MANDAMUS DIRECTED TO THE HONORABLE, MORRIS A. SOPER, JUDGE OF THE DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AND DIRECTED ALSO TO SAID DISTRICT COURT.

CASE "A."

EXHIBIT B.

MR. CLERK:

Please file.

THOS. H. ROBINSON,

Attorney General for the State of Maryland.

HERBERT LEVY,

Asst. Attorney General of the State of Maryland.

EXHIBIT B.

RECORD OF PROCEEDINGS OF THE CIRCUIT COURT FOR HARFORD COUNTY, FILED IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND, FEBRUARY 21, 1925.

STATE OF MARYLAND, HARFORD COUNTY, TO WIT:

At a session of the Circuit Court of the Third Judicial Circuit of the State of Maryland, begun and held for Harford County, at the Court House in the Town of Bel Air, in the same County, on the second Monday of February, it being the ninth day of the same month, in the year of our Lord one thousand nine hundred and twenty-five.

Present:

The Honorable, T. Scott Offutt, Chief Judge,
The Honorable, Frank I. Duncan, Associate Judge,
The Honorable, William H. Harlan, Associate Judge,
The Honorable, Walter W. Preston, Associate Judge,
Isaac W. Thompson, Esq., Sheriff,
D. Gilpin Wilson, Clerk.

Among others were the following proceedings, to wit:

STATE OF MARYLAND
vs.
WILTON L. STEVENS, ROBERT D. FORD, E. FRANKLIN ELY, JOHN M. BARTON, WILLIAM TRABING.

Be it remembered, that at the present term of this Honorable Court, held as aforesaid, Frederick C. Jones, A. Lynn Baker, Wilson R. Mitchell, Isaac A. Hoffman, Harry

F. Daughton, George K. Livezey, Louis Amrein, Charles W. Walker, William A. Bodt, Harry E. Martin, Hargraves Spalding, T. Norman Harkins, Lawrence E. Bauer, Preston C. Snodgrass, J. Henry Baird, Edward Breibenbaugh, Seth B. Taylor, Harry F. Pyle, Frederick O. Veile, Samuel E. Walker, Harry E. Sheridan, George C. Proctor and John E. Webster, good and lawful men of the County aforesaid, who being empannelled, sworn and charged as the Grand Inquest of the State of Maryland for the body of Harford County, having withdrawn from the Bar of this Honorable Court here did afterwards return and present to this Honorable Court a presentment in the words and form following, to wit:

IN THE CIRCUIT COURT FOR HARFORD COUNTY:

February Term, 1925.

The Grand Inquest of the State of Maryland for the body of Harford County do, on their oath present that Wilton L. Stevens, Robert D. Ford, E. Franklin Ely, John M. Barton and William Trabing, late of Harford County aforesaid, at County aforesaid, on the nineteenth day of November, nineteen hundred and twenty-four, did kill and murder Lawrence Wenger, against the peace, government and dignity of the State.

FRED C. JONES, Foreman.

Witness:

Abraham Woods,
Ralph T. Woods,
James Patterson,
John H. Henson,
Dr. P. F. Sappington,
Dewey F. Bowman.

Whereupon, the State of Maryland, by W. Worthington Hopkins, Esq., State's Attorney for Harford County, prose-

cuted and sued forth out of this Honorable Court the Writ of the State of Maryland of *Capias ad respondendum* against the said Wilton L. Stevens, Robert D. Ford, E. Franklin Ely, John M. Barton and William Trabing, to the Sheriff of Harford County, in the words and form following:

STATE OF MARYLAND,

To the Sheriff of Harford County—Greeting:

You are hereby commanded to take the bodies of Wilton L. Stevens, Robert D. Ford, E. Franklin Ely, John M. Barton and William Trabing, late of Harford County, if they shall be found in your bailiwick, and that them so taken, you safely keep, so that you have their bodies before the Circuit Court for Harford County, at the Court House in the same county at once, to answer unto the State of Maryland on a presentment and indictment did kill and murder Lawrence Wenger contrary to the Act of Assembly in such case made and provided, and against the peace, government and dignity of the State.

Hereof fail not at your peril, and have you then and there this Writ.

WITNESS the Honorable T. Scott Offutt, Chief Judge of our said Court, the 9th day of February, 1925. Issued the 10th day of February, 1925.

(Seal.)

Test: D. G. WILSON, Clerk.

Witness:
Abraham Woods,
Ralph T. Woods,
James Patterson,
Charles Cook,
John Cook (col.),

John H. Henson,
Robert Atwell,
Charles Bobbitt,
Dr. P. F. Sappington.

To which said Writ of the State of Maryland of *Capias ad respondendum* (which was delivered to said Sheriff of Harford County to be executed) there has been no Return to this Honorable Court, and the said Wilton L. Stevens, Robert D. Ford, E. Franklin Ely, John M. Barton and William Trabing, as shown by the Records of this Honorable Court are still at large.

And the said W. Worthington Hopkins, Esq., the State's Attorney for Harford County, exhibits to the Grand Inquest of the State of Maryland, for the Body of Harford County, an indictment against the said Wilton L. Stevens, Robert D. Ford, E. Franklin Ely, John M. Barton and William Trabing in the words and form following, to wit:

STATE OF MARYLAND, HARFORD COUNTY, TO WIT:

The Jurors of the State of Maryland, for the body of Harford County, do on their oath present that Wilton L. Stevens, John M. Barton, Robert D. Ford, E. Franklin Ely and William Trabing, late of Harford County aforesaid, on the nineteenth day of November, in the year of our Lord nineteen hundred and twenty-four, at the County aforesaid, feloniously, wilfully and of their deliberately premeditated malice aforethought did kill and murder Lawrence Wenger; contrary to the form of the Act of Assembly in such case made and provided; and against the peace, government and dignity of the State.

W. WORTHINGTON HOPKINS,

State's Attorney for Harford County.

Whereupon, the said Grand Inquest of the State of Maryland for the Body of Harford County, returned the said Indictment to our Honorable Court here thereon endorsed:

"True Bill.

FRED C. JONES, Foreman."

And afterwards, to wit, on the 12th day of February, 1925, a Petition, Affidavit and Order of Court issuing out of the Honorable, the United States District Court for the District of Maryland, commanding the transmission of the Record of Proceedings in the case be sent to the Honorable, the United States District Court for the District of Maryland, were received by the Clerk of the Honorable, the Circuit Court of the Third Judicial Circuit of the State of Maryland, for Harford County, under protest.

STATE OF MARYLAND, HARFORD COUNTY, TO WIT:

I, D. Gilpin Wilson, Clerk of the Circuit Court for Harford County, the same being a Court of Law and Record, hereby certify that the aforegoing is a true, full and complete transcript of the Record of Proceedings in the therein entitled case, as the same remains of record in this office.

IN TESTIMONY WHEREOF I hereto subscribe my name and affix the seal of the Circuit Court for Harford County, this 21st day of February, 1925.

(Seal.)

D. GILPIN WILSON,
Clerk of the Circuit Court of the Third Judicial Circuit of the State of Maryland, for Harford County.

Whereupon, the Record of Proceedings is transmitted accordingly.

D. GILPIN WILSON, Clerk.

UNITED STATES OF AMERICA,

DISTRICT OF MARYLAND, to wit:

I, ARTHUR L. SPAMER, Clerk of the District Court of the United States for the District of Maryland, do hereby certify that the foregoing papers comprising Exhibits "A" and "B" are true copies respectively of all the original papers filed on the respective dates set forth in the captions thereto, in the case of the State of Maryland versus Robert D. Ford, E. Franklin Ely, John M. Barton, Wilton L. Stevens and William Trabing, No. 7189 Criminal, in the District Court of the United States for the District of Maryland; and I further certify that the Docket Entries above set forth are truly taken from the record of proceedings in said case.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of said District Court, this 24th day of September, A. D. 1925.

ARTHUR L. SPAMER,
Clerk.

(Seal.)

CERTIFIED COPY OF DOCKET ENTRIES—CIRCUIT COURT FOR HARFORD COUNTY.

STATE OF MARYLAND *vs.* WILTON L. STEVENS, ROBERT D. FORD, E. FRANKLIN ELY, JOHN M. BARTON, WILLIAM TRABING.	IN THE CIRCUIT COURT FOR HARFORD COUNTY.

Feby. 10, 1925—Present. for Murder filed and Capias Issd. Same day Indictment endorsed and True Bill filed.

Feby. 12, 1925—Petition and Affidavit of the District Attorney of the United States District Court for the District of Maryland for Removal and Order of said Court commanding the Record of Proceedings be sent to said United States District Court for the District of Maryland recorded by the Clerk of this Court under Protest and copy of same left and filed.

STATE OF MARYLAND, HARFORD COUNTY, SCT:

I hereby certify that the above is a true copy of the Docket Entries in the above entitled case, as same remains of record in this office.

In Testimony Whereof, I hereto subscribe my name and affix the Seal of the Circuit Court for Harford County, this 11th day of September, 1925.

D. GILPIN WILSON,
Clerk of the Circuit Court
for Harford County.

(Seal.)

23 Orig.

IN THE

Supreme Court of the United States

STATE OF MARYLAND
versus
MORRIS A. SOPER, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND, AND THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

CASE "A."

BRIEF IN SUPPORT OF PETITION FOR MANDAMUS ON BEHALF OF THE STATE OF MARYLAND.

Mr. Clerk:

Please file:

THOS. H. ROBINSON,
Attorney General of Maryland.

HERBERT LEVY,
Assistant Attorney General of Maryland.

The Daily Record Company Print, Baltimore, Md.

INDEX.

TABLE OF CASES.

STATUTES CITED.

STATE OF MARYLAND *vs.* MORRIS A. SOPER, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND, AND THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.	IN THE SUPREME COURT OF THE UNITED STATES.

CASE "A".

BRIEF IN SUPPORT OF PETITION FOR MANDAMUS ON BEHALF OF THE STATE OF MARYLAND.

Statement of the Case.

On the 10th of February, 1925, Robert D. Ford, John M. Barton, E. Franklin Ely, Wilton L. Stevens and William Trabing, were indicted in the Circuit Court for Harford County, State of Maryland, for the murder on or about the 19th day of November, 1924, of one Lawrence Wenger, a citizen of the State of Maryland.

On the 11th day of February, 1925, the defendants in said indictment, through the United States Attorney for the District of Maryland, filed a petition in the District Court of the United States for the District of Maryland (Morris A. Soper, Judge), for the removal of said case from the Circuit Court for Harford County to the said District Court, under the provisions of *Section* 33 *of the*

Judicial Code, and for a writ of *habeas corpus cum causa* for that purpose.

The petition alleged that the petitioners were, with the exception of Trabing, Federal Prohibition Agents of the Bureau of Internal Revenue of the Treasury Department of the United States, and at the time of the murder, were acting under and by authority of the Federal Prohibition Director of the State of Maryland, and that Trabing was acting as chauffeur for said Federal Prohibition agents, under and by authority of said Federal Prohibition Director of the State of Maryland, and of the said Federal Prohibition Agents.

For convenience, however, no distinction will be hereafter made between Trabing and the others. All will be designated and referred to as "Federal Prohibition Agents."

The petition further alleged that at the time of the murder the petitioners were in the discharge of their official duties as Prohibition Agents in making and attempting to make an investigation in the discharge of their duty and in protecting themselves in the discharge of their duty, but it denied they were guilty of the murder.

Upon this petition the Court passed an order removing the case and directing the writ of *habeas corpus cum causa* to issue as prayed.

The writ was served and the petitioners were admitted to bail by the District Court of the United States for the District of Maryland.

After the record of the proceedings of the Circuit Court for Harford County was filed in said District Court pursuant to said order of removal, the State of

Maryland appeared specially in said District Court and filed a motion to quash the writ and rescind the order of removal.

Upon a hearing of said motion, the Court ruled that the petition for removal was defective, but granted leave to the petitioners to amend the same.

Thereafter, the petitioners filed an amended petition for removal. The amended petition differed from the original in the following particulars:

(1) It alleged that the petitioners were acting under the authority of, and enforcing not only the National Prohibition Act and acts supplemental thereto, but all internal revenue laws relating to the manufacture, sale, transportation, control and taxation of intoxicating liquors, with authority to execute and perform all the duties delegated to such officers by law.

(2) It further alleged, in general terms, that at the time of the murder the petitioners were engaged in their official duties as prohibition officers in making and attempting to make an investigation concerning a violation, not only of the National Prohibition Act, but of other internal revenue laws.

(3) It set out in great detail the acts and movements of the petitioners on the day of the murder. It set forth that after the petitioners had completed an investigation in Harford County, Maryland, of a violation of the National Prohibition Law, they started to return to their automobile for the purpose of returning to Baltimore to report to the office of the Federal Prohibition Director concerning the results of their investigation when they discovered a man whom they afterwards learned to be one Lawrence Wenger, mortally wounded and lying be-

side the path along which they were walking. They carried the wounded man to their automobile and took him to Jarrettsville, Maryland, and thence to Belair, Maryland, for the purpose of obtaining medical attention for him, and finally placed the said Wenger in charge of a doctor in Belair, who pronounced him dead. They then removed the body to an undertaker's establishment in Belair. The said petition did not allege that Wenger was involved in the violation of the National Prohibition Law which the petitioners were investigating, or that they were responsible, either lawfully or unlawfully, for the death of said Wenger, or that any act performed by them under color of their office resulted in the death of Wenger, or that they had knowledge of the manner in which Wenger came to his death, or that Wenger's death resulted from any act performed by them in their self-protection as Federal Prohibition officers in the discharge of their duties.

(4) The removal was sought under *Section* 28, *Title II of the National Prohibition Act*, as well as under *Section* 33 *of the Judicial Code.*

Upon the filing of the amended petition, the State of Maryland again appeared specially and again moved to "quash and remand." On May 5th, 1925, by order of the District Court, this motion to "quash and remand" was overruled, and the original order removing the case was ratified and confirmed.

In this proceeding, the State of Maryland asks this Court to entertain a petition for mandamus directed to Morris A. Soper, Judge of the District Court of the United States for the District of Maryland, and said District Court to compel the said Judge and said Court to remand the said prosecution to the Circuit Court for Harford County, Maryland.

ARGUMENT.

Points To Be Discussed.

I.

This Court is vested with jurisdiction to entertain the petition for mandamus in this case. Mandamus lies from this Court to compel a Federal District Court to remand a criminal prosecution to the State Court where it is apparent from the record that the Federal Court has no jurisdiction whatever of the case.

II.

Removal acts are strictly construed. They are not enlarged by construction.

III.

The jurisdiction of the Federal Court under removal acts rests and depends upon the statements made in the petition for removal and verified by the oath of the petitioner.

IV.

The scope of Section 33 of the Judicial Code.

A. The persons to whom it is applicable.

1. It does not apply to Federal Prohibition Agents.

2. Section 28 of Title II of the National Prohibition Act does not enlarge its scope, so as to confer the right of removal upon Federal Prohibition Agents.

B. The actions and prosecutions embraced within it.

1. It applies only where the act which is the basis of the action or prosecution has some rational connection

with official duties under a "Revenue Law" and in some way affects the revenue of the Government.

I.

This Court is vested with jurisdiction to entertain the petition for mandamus in this case. Mandamus lies from this Court to compel a Federal District Court to remand a criminal prosecution to the State Court where it is apparent from the record that the Federal Court has no jurisdiction whatever of the case.

It has been decided in a number of cases that the extraordinary remedy of mandamus cannot be resorted to in a *civil proceeding* to compel an inferior Federal Court to remand a case pending therein to the State Courts, after denial by the inferior Federal tribunal of a motion so to remand. The basis for this rule, as stated in *Re Pollitz*, 206 U. S. 323, 51 L. ed. 1081, 28 Sup. Ct. Rep. 729 (page 331), is that "mandamus cannot be issued to compel the Court below to decide a matter before it in a particular way, or to review its judicial action had in the exercise of legitimate jurisdiction, nor can the writ be used to perform the office of an appeal or writ of error."

Ordinarily, mandamus is not to be used when another statutory method has been provided for reviewing the action below, or to reverse a decision of record.

It has been broadly asserted that the inferior Federal tribunals have the power to decide whether or not they have jurisdiction to try a *civil* cause properly brought before them, and that such decisions are not open to collateral attack.

Ex parte Hoard, 105 U. S. 578, 26 L. ed. 1176;
Re Pollitz, supra;
Ex parte Nebraska, 209 U. S. 436, 52 L. ed. 876, 28 Sup. Ct. Rep. 581;

Ex parte Gruetter, 217 U. S. 586, 54 L. ed. 892, 30 Sup. Ct. Rep. 690;
Re Harding, 219 U. S. 363, 55 L. ed. 252, 31 Sup. Ct. Rep. 324, 37 L. R. A. (N. S.) 392;
Ex parte Roe, 234 U. S. 70, 58 L. ed. 1217, 34 Sup. Ct. Rep. 722;
Ex parte Park Square Automobile Station, 244 U. S. 412, 61 L. ed. 1231, 37 Sup. Ct. Rep. 732;
Ex parte Riddle, 255 U. S. 450, 65 L. ed. 725, 41 Sup. Ct. Rep. 370.

Until the decision in *Re Harding, supra,* there was an apparent conflict between certain decided cases dealing with the right to review by mandamus orders of inferior Federal tribunals refusing to remand, and a long and settled line of other cases relating to the same subject, but in the *Harding* opinion, all of the cases upon the subject are set out at length and discussed, and the Court announced the general rule, above stated, to be applied in civil cases. In doing so, it disapproved and qualified the following cases:

Ex parte Wisner, 203 U. S. 449, 51 L. ed. 264, 27 Sup. Ct. Rep. 150;
Re Moore, 209 U. S. 490, 52 L. ed. 904, 28 Sup. Ct. Rep. 585, 706, 14 A. & E. Annotated Cases 1164;
Re Winn, 213 U. S. 458, 53 L. ed. 873, 29 Sup. Ct. Rep. 515,

to the extent that said cases were in conflict with the general doctrine announced in *Ex parte Hoard, supra,* and the cases which have followed it.

In the *Harding* case an exception to the general rule above stated, which had been recognized in several earlier

cases was referred to with approval and affirmed. This exception related to the power of this Court to utilize the writ of mandamus to remand a *criminal prosecution* "which, if wrong was committed, no power otherwise to redress than by mandamus existed" (page 378).

This exception has been recognized in the following cases:

Virginia vs. Rives, 100 U. S. 313, 25 L. ed. 667, 3 Am. Crim. Rep. 524;

Virginia vs. Paul, 148 U. S. 107, 37 L. ed. 386, 13 Sup. Ct. Rep. 636;

Kentucky vs. Powers, 201 U. S. 1, 50 L. ed. 633, 26 Sup. Ct. Rep. 387, 5 A. & E. Annotated Cases 692.

The State of Maryland, in asking this Court to entertain this petition for mandamus, contends that the case at bar falls within the exception announced in the cases last cited. A careful examination of said cases discloses their marked similarity with the instant case.

In *Virginia vs. Rives, supra,* a prosecution of persons accused of murder was removed from a State Court to a Circuit Court of the United States. The latter Court, moreover, under a writ of *habeas corpus cum causa,* took the prisoners from the custody of the State authorities. The Commonwealth of Virginia made application to the Supreme Court of the United States for a rule to show cause why the prisoners should not be returned to the State Court for trial. On hearing, the Court took jurisdiction over the cause, issued the writ of mandamus and directed the return of the accused.

The grounds for the assumption of jurisdiction by the Circuit Court, as they appear from the opinion of the

Court and the concurring opinion, may be summarized as follows:

(1) The jurisdiction is conferred by *Section* 688 *of the Revised Statutes* (*Second Edition,* 1878), pages 127-128; *Act.* 24 *Sept.,* 1789, c. 20, s. 13, v. 1, p. 80; *Judicial Code,* Section 234; *Act March* 3, 1911, c. 231, s. 234; 36 St. 1156), which reads, in part, as follows:

> "The Supreme Court shall have power to issue * * * writs of mandamus, in cases warranted by the principals and usages of law, to any Courts appointed under the authority of the United States, or to persons holding office under the authority of the United States, *where a State * * * is a party.*"

See also:

United States Compiled Statutes, 1916, *Annotated,* Vol. 2, Sec. 1211, pp. 1567; 1570-1579;

Ibid, 1919 *Supplement,* Vol. 1, pp. 214-215.

(2) It is the function of the writ of mandamus to control judicial discretion when that discretion has been abused.

> "It is a remedy where the case is outside of the exercise of this discretion, and outside the jurisdiction of the Court or officer to which or to whom the writ is addressed" (100 U. S. 323).

(3) The asserted power of the inferior Federal tribunal implied a confusion and disregard of constitutional limitations.

(4) No power would otherwise have existed to correct the wrongful assumption of jurisdiction by the Circiut Court.

> "The jurisdiction invoked is, in its nature appellate; and there is no other mode provided for its

exercise in the case at bar than by the writ prayed.
* * *

"And so in the case at bar, without the use of this writ, the greatest possible injury would be inflicted upon the Commonwealth of Virginia, without any redress, if the Circuit Court, as contended, transcended its jurisdiction. In no case, therefore, could the writ be more properly issued in the interest of justice, order and good government. Nor was there any necessity for a previous demand upon that Court in the way of a motion to remand the prisoners." (*Concurring opinion, Mr. Justice Field,* 25 L. ed. 673).

In *Virginia vs. Paul, supra,* a person in the custody of the State authorities, charged with murder, was released under a writ of habeas corpus, issued by a District Judge. Subsequently the Circuit Court of the United States took, by way of removal, jurisdiction over the prosecution. The Commonwealth of Virginia applied to this Court for a mandamus to remand the prosecution and restore the accused to the custody of the State authorities. The Court reaffirming the doctrine of *Virginia vs. Rives,* pointed out that to wrongfully devest the State of its right to prosecute in its own Court for crimes committed against its authority was a gross abuse of discretion, which, if not corrected by mandamus could not be done in any other form. A mandamus to remand was issued.

In passing upon the jurisdictional question, Mr. Justice Gray, who delivered the opinion of the Court said (pp. 122-123):

"The result is that the Circuit Court of the United States has, without authority of law, assumed jurisdiction of an indictment found in the Courts of the State of Virginia for a crime against the laws of the State, and that the State is entitled to have the

prosecution remanded to its Courts, to be there dealt with according to law. For aught that appears on this record, the State is not bound to commence or to carry on the prosecution in the Courts of another government, but is entitled to resume its own rightful jurisdiction and authority and to try the offender in its own Courts. If the case should be allowed to proceed in the Circuit Court of the United States, and should finally result in an acquittal of the charge, in whole or in part, the State could not have a writ of error to review the judgment. *United States vs. Sanges*, 144 U. S. 310. A stronger case for issuing a writ of mandamus can hardly be imagined. The writ may be directed to the Judge who has lawfully assumed jurisdiction of the prosecution; and no prevoius motion to him to remand the case was necessary. The case is governed in every particular by *Virginia vs. Rives*, 100 U. S. 313, 316, 323, 324."

In *Kentucky vs. Powers, supra,* upon the petition of the Commonwealth of Kentucky for a writ of mandamus to compel the Circuit Court of the United States for the Eastern District of Kentucky to remand a criminal prosecution which had been removed to that Court from the Circuit Court of Scott County in that State and to restore the custody of the accused to the State authorities, the rule for mandamus was made absolute. The doctrine of *Virginia vs. Rives* as to the jurisdiction of the Court was applied, without comment in the opinion.

It will be observed that the case at bar clearly falls within the exception to the rule. It bears the closest resemblance to *Virginia vs. Paul,* where, as here, the inferior Federal Court had ordered a removal under the alleged authority of *Section* 33 *of the Judicial Code.*

It may be contended that the petitioner's remedy is by appeal from the order of the District Court of the United States refusing to remand the case to the State

Court. But it is well established that such a review can be had only after final judgment.

McLish vs. Roff, 141 U. S. 661, 35 L. ed. 893.

But if the final judgment is one of acquittal of the charge, in whole or in part, the State could not have a writ of error to review the judgment (*U. S. vs. Sanges*, 144 U. S. 310, 36 L. ed. 445).

It thus appears that unless this Court entertains the petition for mandamus in this case, the State of Maryland is without any redress, if the District Court, as contended, has transcended its jurisdiction in removing this case from the State Court, and in denying the State's motion to remand the same.

II.

Removal acts are strictly construed. They are not enlarged by construction.

In dealing with statutes intended to affect or claimed to affect the continuation of jurisdiction in courts of original and general authority the law has always recognized a principle of construction which served to favor the retention of jurisdiction. This Court has held that even under the *Judiciary Act of* 1875, which was designed to increase the Federal jurisdiction by removal, the Court was "not disposed to enlarge that jurisdiction by mere construction."

Blake vs. McKim, 103 U. S. 336, 26 L. ed. 563;
Sewing Mach. Co.'s Case, 18 Wall. 553, 21 L. ed. 914.

Although the successive removal acts of Congress have a common object, namely, the transfer of actions from State to Federal Courts, they provide for different and

distinct grounds on which the right of removal is to depend and no case is subject to removal, which is not by its facts brought completely within some defined class.

It is always helpful to a Court in interpreting a statute to consider the evil which the statute was designed to prevent or remedy.

Section 33 of the Judicial Code, as amended by the Act of August 23rd, 1916, *c.* 399 (*R. S. Sec.* 643, *Act March 3rd,* 1875, *c.* 130, *Sec.* 8, 18 *Stat.* 401. *Act February* 8, 1894, *c.* 25, *Sec.* 1, 28 *Stat.* 36. *Act March* 3, 1911, *c.* 231, *Sec.* 33, 36 *Stat.* 1097. *Act August 23rd,* 1916, *c.* 399, 39 *Stat. Compiled St.* (1916), *Sec.* 1015, *V.* 1, *pp.* 1019-1020)*, involved in this case, was passed in consequence of an attempt, by one of the States to make penal the collection by United States officers within the State of duties under the tariff laws.

Tennessee vs. Davis, 100 U. S. 257, 25 L. ed. 648.

People's United States Bank vs. Goodwin (C C., 1908), 162 Fed. 937.

Its purpose is to protect the Federal Officers of the Government in the discharge of their official duties, and those who are employed to act under them in the performance of such duties; but, further than providing this necessary protection to the administration of its revenues, the Federal Government is not interested. The statute must be interpreted with reference to its manifest spirit and general purpose, and a word or phrase should not be extended beyond its proper relation to give

* See Appendix.

jurisdiction where the jurisdiction does not appear to have been intended.

Johnson vs. Wells Fargo & Co., (C. C., 1899), 98 Fed. 3, 8.
Virginia vs. DeHart (C. C., 1902), 119 Fed. 626, 629.

III.

The jurisdiction of the Federal Court under removal acts rests and depends upon the statements made in the petition for removal and verified by the oath of the petitioner.

This rule was applied by this Court to *Section 33 of the Judicial Code*, in the case of *Virginia vs. Paul, supra*, and in this respect it is the same as that which obtains in proceedings for removal under the general removal acts.

See authorities collected, *U. S. Compiled Statutes*, 1916, Annotated, Vol. 1, pages 972-973;
Salem & L. R. Co. vs. Boston & L. R. Co., 21 Fed. Cases p. 228, Fed. Cas. No. 12249.

IV.

The scope of Section 33 of the Judicial Code.

A. The persons to whom it is applicable.

(1) "Any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted."

(2) "Any person acting under or by authority of any such officer."

(3) "Any officer of the courts of the United States."

(4) "Any person * * * * while an officer of either House of Congress."

It is asserted that the officers and agents who claim the right of removal in this case come within classifications (1) and (2), supra.

But it is respectfully submitted that FEDERAL PROHIBITION AGENTS ACTING UNDER THE NATIONAL PROHIBITION LAW ARE NOT REVENUE OFFICERS AND THE NATIONAL PROHIBITION LAW IS NOT A REVENUE LAW.

The National Prohibition Act is not a revenue law.

Lipke vs. Lederer, 259 U. S. 557, 66 L. ed. 1061.

Whether officers enforcing the National Prohibition Law are entitled to remove prosecutions against them in State Courts, under *Section 33 of the Judicial Code,* has never been passed upon by this Court.

However, the question has been determined in six jurisdictions by the inferior Federal tribunals. The decisions are not in accord.

The first case in which the question arose was *Oregon vs. Wood,* 268 Fed. 975, in the District Court of Oregon. That case, decided before *Lipke vs. Lederer, supra,* held that the National Prohibition Law was a revenue law, Federal Prohibition Agents were revenue officers and prosecutions against them in the State Courts were removable.

Morse vs. Higgins, 273 Fed. 830, decided by the District Court of New Hampshire, is next in point of time. It first denied the right of removal upon the ground that the National Prohibition Act was not a revenue law. However, upon a reconsideration of the case (273 Fed. 832), it was held that *Section* 28, *Title II, of the National Prohibition Law* seemed to contemplate Federal protection of officers acting under its authority, and the removal was granted.

Then follows *Smith vs. Gillian*, 282 Fed. 628, decided by the District Court of the Western District of Kentucky, which denied the removal upon the following grounds:

(1) Prohibition officers are not revenue agents.

(2) The prohibition law is not a revenue law.

(3) *Section* 28, *Title II, of the National Prohibition Law* does not authorize the removal.

This is a well-reasoned opinion.

Commonwealth vs. Bogan, 285 Fed. 668, decided by the District Court of Massachusetts, followed this Court in *Lipke vs. Lederer* in holding that the National Prohibition Law was not a revenue law, but refused to adopt the reasoning of *Smith vs. Gillian* as to the applicability of *Section* 28, *Title II, of the National Prohibition Law*. The Court held that the right of removal was a "protection" to prohibition agents in the enforcement of the act, within the meaning of the latter section, and ordered the removal.

The District Court of Pennsylvania in *U. S. vs. Commonwealth of Pennsylvania*, 293 Fed. 931, followed the

District Courts of Oregon, New Hampshire and Massachusetts, but in doing so, Judge Dickinson frankly stated that he was following "the main current of decisions without an expression of what might otherwise have been our individual opinion," with the idea that the rule in these cases should be made uniform throughout the United States.

The last adjudication upon the question was by Judge Bondy in the United States District Court for the Southern District of New York in the case of *Wolkin vs. Gibney*, 3 Fed. Rep., 2nd Series, 960. Judge Bondy followed *Smith vs. Gillian* and denied the right of removal.

It thus appears that all of the Courts which have had occasion to pass upon the question since *Lipke vs. Lederer* have accepted the view that the National Prohibition Law is not a revenue measure, and that revenue officers are, therefore, not within the provisions of *Section 33 of the Judicial Code.*

There is, however, a diversity of opinion as to the effect to be given to *Section 28, Title II, of the National Prohibition Law*, with reference to the right of Federal Prohibition Agents to remove prosecutions against them in the State Courts. But it is respectfully submitted that SECTION 28, TITLE II, OF THE NATIONAL PROHIBITION ACT, DOES NOT ENLARGE THE SCOPE OF SECTION 33 OF THE JUDICIAL CODE, SO AS TO CONFER THE RIGHT OF REMOVAL UPON FEDERAL PROHIBITION AGENTS.

Section 28, Title II, of the National Prohibition Act reads as follows:

> "The Commissioner, his assistants, agents, and inspectors, and all other officers of the United States whose duty it is to enforce criminal laws, shall have

> all the power and protection in the enforcement of this act or any provisions thereof which is conferred by law for the enforcement of existing laws relating to the manufacture or sale of intoxicating liquors under the law of the United States."

It was urged in *Smith vs. Gillian* that the word "protection" in the above section, must be so construed as to include the right of removal. But after a careful analysis of the body of the then existing internal revenue laws, and a thorough research of the "history of the times when efforts were being made to prepare and enact such laws as might be deemed proper to enforce the Eighteenth Amendment to the Constitution," the learned Judge found that nothing was included in the National Prohibition Law which in any way indicated an intention to provide for the removal of actions, nor for any amendment of Section 33 of the Judicial Code.

The Court said (pp. 638-639):

> "With these statutes before us, we have sought to ascertain what 'power and protection' in the enforcement of that act had been given by Section 28, which, in express terms, had provided that it should be the same as that 'conferred by law for the enforcement of existing laws relating to the manufacture or sale of intoxicating liquors under the law of the United States,' inasmuch as that seemed clearly to be its full scope, and, limiting our efforts to those 'then existing laws,' our analysis of them seems clearly to show what 'power and protection' were in the mind of Congress when it enacted the statute to enforce the Eighteenth Amendment.
>
> "In short, internal revenue officers under those laws were authorized and empowered—
>
> (1) To enter at all times upon the premises of a distiller, and, if demand for admission was refused, to break into such premises or a distillery thereon

(Section 3177, R. S.), and if they were hindered or obstructed in this fines were imposed.

(2) To collect taxes by distraint, and, if needful, to make repeated seizures of property (Section 3187, R. S.).

(3) To break into any distillery by force if refused admission thereto (Section 3276, R. S.).

(4) To break up and into the ground on the premises where any distillery was located (Section 3277, R. S.).

(5) To make seizures of property under Sections 3166, 3200, 3453 and 3460, R. S. (Sections 5886, 5922, 6355 and 6362, Comp. Stats.); and

(6) District Judges were authorized to issue search warrants.

"We have in this painstaking way gone into these features of 'then existing laws' because of the novelty as well as the importance of the questions involved, and find that, while the National Prohibition Act has throughout made elaborate provision for the drastic enforcement of its own requirements, including the usual powers given prohibition officers and agents in respect to seizures and destruction of property and otherwise, these provisions are not important here, as they are new, and no one of them confers the right to remove a case from a state to a federal court.

"It seems, therefore, to be clear that the legal authority and 'power,' and therefrom resulting 'protection,' thus given by pre-existing law were what Congress had in mind when it enacted Section 28. If anything else, including any removal of cases, had been intended, a clause to that effect would have been inserted, for, obviously, the 'protection' resulting from the provisions of the Revised Statutes is clearly and certainly available in all courts, state and federal alike, without any removal from one to another, inasmuch as such statutes are the supreme law of the land upon the subject."

The Court further said (pp. 640-641):

> "It would, we think, be fair to say that a conclusion that there was such intention would be forced and inadmissible, if not extravagant. To do as urged on behalf of the defendants would indeed be legislation, and not an interpretation of legislation already in force, and not amendable by the Courts.
>
> "While the removal of a case should always be made if authorized by law, a removal which is not so authorized should always be refused and the previously acquired jurisdiction of the State Court respected.
>
> "The laws of the United States are supreme. They reach and 'protect' citizens in the State Courts as fully as they could here whether the plea therein be self defense (apparently applicable here), or one based upon conduct made lawful by some statute of the United States or of Kentucky.
>
> "Here, however, the question presented is not on the merits of the controversy, but is one of jurisdiction only. That was first acquired by the State Court, and cannot be taken from it, unless clearly authorized by some law of the United States. None has been found, and we have concluded that Congress did not give, nor intend to give the power or right of removal in cases like this."

It may be contended that the applicability of the provisions of *Section* 33 *of the Judicial Code* and of *Section* 28 *of Article II of the National Prohibition Law to* Federal Prohibition officers is not involved in this case because of the allegations in the amended petition for removal that the petitioners therein were acting under the authority of and were enforcing all internal revenue laws relating to the manufacture, sale, transportation, control and taxation of intoxicating liquors with authority to execute and perform all the duties delegated to such officers by law, and because of the further allega-

tion that the acts alleged to have been done by said petitioners were alleged to have been done at a time they were engaged in the discharge of their official duties not only as Federal Prohibition officers, but in the performance of their duties "under other revenue laws."

But it is respectfully submitted that when the allegations of the amended petition are read together with the allegations of the original petition, it is patent that the express purpose of these additional allegations in the amended petition was to avoid the contention that the removal statute did not include Federal Prohibition Officers within its terms. The facts of the case, as set out in the amended petition, make it abundantly clear that the duties which these petitioners were alleged to have been performing at the time of the happenings which form the basis of the indictment were being performed in their capacity as Federal Prohibition Officers and not as general revenue officers enforcing "other revenue statutes."

We submit, therefore, that despite the effort on the part of the said petitioners to avoid this question, the problem is nevertheless before the Court for its determination.

Moreover, we submit that the reasoning of the Court in *Smith vs. Gillian* is sound and logical and should be adopted, and this Court should hold that the removal statutes are not applicable to Federal Prohibition Officers.

B. The actions and prosecutions embraced within Section 33 of the Judicial Code.

Section 33 of the Judicial Code, so far as it affects revenue officers appointed under or acting by authority

of revenue laws, provides for the removal at any time before trial or before hearing thereof, of

> "* * * any civil suit or criminal prosecution * * *" against any such officer,

(1) "on account of any act done under color of his office or any such law, or on account of any right, title or authority claimed by such officer or other person under any such law," or

(2) "on account of any right, title or authority claimed by such officer or other person under any such law," or

(3) against any person holding property or estate by title derived from any such officer, where the suit or prosecution affects the validity of any such revenue law.

In order to bring the prosecution involved in this case within the above provisions, it must be found:

(1) That the facts upon which it is based bring it completely within one of the defined classes; and

(2) Such facts must appear on the face of the indictment or the petition for removal.

In the consideration of these questions, the following facts are pertinent:

(1) The Federal Prohibition Agents in their petition for removal deny they brought about the death of Wenger, or

(2) Had any knowledge of who was responsible therefor, or how the said Wenger came to his death.

(3) It is nowhere alleged in either the original or amended petitions for removal that the deceased was

engaged in the violation of the National Prohibition Law or any other revenue law at the time of his decease; or

(4) That the agents suspected Wenger of any violation of the National Prohibition Law or any other revenue law, or

(5) That Wenger was connected in any way with any investigation in which the agents allege they were engaged, or

(6) That the homicide was the result of any act upon the part of said agents to protect themselves or each other in the discharge of any duty they were performing.

(7) Their amended petition sets forth that on the day of the murder they were engaged in an investigation, directed by the Maryland Federal Prohibition Director, of the alleged unlawful distillation of intoxicating liquor on a farm known as the Harry Carver Farm, which was situated approximately three miles from the village of Madonna, about twelve miles northwest from Belair, Maryland, which said property was then unoccupied. They reached the farm premises shortly after midday, and discovered there in a secluded wooded valley and swamp, materials for an illicit distilling operation. They concealed themselves in the woods and shrubbery nearby the still site, and shortly thereafter became aware of the approach of a number of men bringing with them a still. They made their presence known to the men who were approaching, and the men immediately dropped the still and fled, and though they pursued them across the fields, no one of the fleeing men was overtaken or arrested. Thereupon the agents returned to the still site, destroyed the material which constituted the unlawful distilling plant, and started to return to their car which had been

left some distance from the still site, for the purpose of returning to Baltimore to report to the office of the Maryland Prohibition Director the results of their investigation, when they discovered a man, whom they afterwards learned to be one Lawrence Wenger, mortally wounded and lying beside the path along which they were walking, some four or five hundred yards from the still site and in a direction opposite to that from which the unknown men had approached and towards which they fled. They carried the wounded man to their car and took him to Jarrettsville, Maryland, for medical attention. Finding none available, they proceeded with all speed to Belair where they finally succeeded in placing the said Wenger in charge of a physician, who pronounced him dead. They then removed his body to an undertaking establishment in Belair.

Under the above facts, *what act done by them under color of their office or any revenue law can be said to have resulted in the prosecution?*

The investigation they were conducting? No.

Any act of self-protection or for the protection of each other? No.

Any act in attempting to apprehend the supposed violators of the National Prohibition Law? No.

Any act in returning to Baltimore to report their investigation? No.

Any act in attempting to obtain medical attention for the deceased? No.

If the prosecution was not on account of any act done under color of their office or under color of any revenue

law, then the prosecution should not have been removed, because it is obvious that the prosecution did not arise (1) on account of any right, title or authority claimed by them under any revenue law, and (2) said prosecution was not commenced against any person holding property or estate by title derived from any revenue officer and did not affect the validity of any revenue law,—the other two classes of prosecutions to which the statute is applicable. So we must find that the prosecution arose out of an act done under the color of their office or under the color of a revenue law, unless the statute is construed to mean that the right of removal is accorded to every officer described in the Act merely by virtue of his office, irrespective of the nature of the act or of the circumstances under which it was committed.

To permit of this latter construction, it would be necessary to hold that Congress intended to authorize the removal of all actions and prosecutions against revenue officers, irrespective of their origin or their connection with the duties of said officers under the law.

Such a construction would be in disregard of the plain language of the statute. The words "act done under color of his office or any such law" would be rendered meaningless and would have to be eliminated from the statute by construction. Every revenue officer would be entitled to have tried all actions brought against him, before Courts of his own choice, and in all criminal prosecutions against him, to have the benefit of the legal services of the United States District Attorney. Certainly, if this result was constitutionally possible, Congress did not intend it in the enactment of the law. The history of the law belies it. It was passed to prevent the States from interfering with Federal collection of revenue. How is this purpose subserved by granting the

unusual privilege of removal in all cases, whether or not the action or prosecution against the officer has any rational connection with his official duty, or whether or not it in any way affects the revenues of the Government.

There are many actions and crimes which cannot have any reasonable connection with the officer's duties or with the collection of the Government's revenue.

The wanton, deliberate and unwarranted use of a gun, even during an "investigation," where there is no excuse of self-protection or any other excuse; the use of a weapon upon an innocent man, not charged with the violation of the law or with attempting to resist the enforcement of the law; the sexual crimes, such as incest, bigamy, rape, etc.—all these are examples—(and others might be cited) of cases which could not possibly be brought within the Act. Can it be seriously contended that because any of the aforementioned acts have been committed during the hours of duty of an officer they are *acts* done under color of his office or of any revenue law?

Certainly, therefore, a mere denial of guilt does not create a presumption that the acts with which the officer is charged were done under color of his office.

It may be asserted that the construction contended for by the State of Maryland would require revenue officers to admit their guilt or to establish their legal justification for the act done as a condition precedent to the exercise of their right of removal. That this argument is fallacious is apparent from a comparison of *Section 33 of the Judicial Code* with *Revised Statutes, Section* 753 (*U. S. Comp. St.* 1916, *V.* 2, *Sec.* 1281, *page* 2070).

The latter Act provides that the Federal Courts shall have the power to release by habeas corpus, persons "in

custody for an act done or omitted in pursuance of a law of the United States." To warrant the exercise of this jurisdiction, this Court has held that it must be established:

(1) That under the circumstances disclosed, the petitioner for habeas corpus was acting in pursuance of the law of the United States and *within the scope of his authority as a Federal officer;*

(2) That his confinement will injure and seriously affect the authority and operations of the National Government; and

(3) That the case was one of extreme urgency where the Federal Court having heard the facts believes that a proper exercise of the discretion vested in it demands the discharge of the prisoner.

Drury vs. Lewis, 200 U. S. 1, 50 L. ed. 343, 26 S. Ct. Rep. 229.

See also:

Pales vs. Paolo, (C. C. A., 1st Circuit), Adv. Sheets, Fed. Rep. July 23, 1925, p. 280;
U. S. vs. Weeden, 24 Fed. Cas. 738; Fed. Cas. No. 14412;
In re: Marsh, 51 Fed. 277;
Castle vs. Lewis, 254 Fed. 917 (C. C. A., 8th Circuit).

The celebrated case of *Cunningham vs. Neagle,* 135 U. S. 1, 34 L. ed. 55, 10 S. Ct. Rep. 658, also arose under the section last above referred to.

It follows that under *Rev. St. Section* 753, petitioner must establish, *inter alia,* his innocence of the crime charged as a condition of his release.

If the requirements for *removal* were the same as those for release by habeas corpus, it would follow that there would be no necessity for removal to and trial in the Federal Court. The petitioner having already established his innocence, no trial would be necessary.

But the distinction between the two provisions of the law lies in those words found in the removal statute; "*under color* of his office or of any such law." The phrase, "under color" implies that for removal, the officer must establish *prima facie*, that is to say, he must set up in his petition such facts as show affirmatively, that the act upon which the prosecution is grounded was done in the *probable* pursuance of his duties or was within the apparent scope of his authority.

When he seeks his release by habeas corpus he must go further. He must show that the act was *actually* within the scope of his authority.

A review of the cases arising under *Section 33 of the Judicial Code* shows that in every instance where the removal was granted, some specific act under color of his office or under color of a revenue law, was set forth, either expressly or impliedly, in the petition for removal. In every case, there was no mere "traverse," but there was a "confession and avoidance," that is to say, there was a statement of the act done by the officer, resulting in his prosecution, which showed *prima facie*, that said act was done under color of his office.

In *Tennessee vs. Davis*, 100 U. S. 257, 25 L. ed. 648, the facts, as stated in the syllabus, were as follows:

> "A. was, in the State Court of Tennessee, indicted for murder. In his petition, duly verified, for removal of the prosecution to the Circuit Court of the United States, he stated that, although indicted for

murder, no murder was committed; *that the killing was done in necessary self-defense, to save his own life;* that at the time the alleged act for which he was indicted was committed, he was and still is an officer of the United States, to wit, a deputy collector of internal revenue; *that the act for which he was indicted was performed in his own necessary self-defense* while engaged in the discharge of his duties as deputy collector and while acting by and under the authority of the internal revenue laws of the United States; *that what he did was done under and by right of his said office;* that it was his duty to seize illicit stills and apparatus used for the illicit and unlawful distillation of spirits; and that while so attempting to enforce said laws, as deputy collector as aforesaid, *he was assaulted and fired upon by a number of armed men, and that in defense of his life he returned the fire, which is the killing mentioned in the indictment.*" (Italics ours.)

It was held that the petition was in conformity with the statute, and, upon being filed, the prosecution was removed to the Circuit Court of the United States.

The following language of Mr. Justice Strong, who wrote the opinion, as to the purpose and intent of the law, shows very clearly that it was never intended to embrace a case such as the one at bar (pp. 261-262):

"Now certainly the petition for the removal represented that the act for which the defendant was indicted was done not merely under color of his office as a revenue collector or under color of the revenue laws, not merely while he was engaged in performing his duties as a revenue officer, but that it was done under and by right of his office and while he was resisted by an armed force in his attempts to discharge his official duty. This is more than a claim of right and authority under the law of the United States for the act for which he has been indicted. It is a positive assertion of the existence of such au-

thority. But the act of Congress authorizes the removal of any cause when the acts of the defendant complained of were done, or claimed to have been done in the discharge of his duty as a Federal officer. It makes such a claim a basis for the assumption of Federal jurisdiction of the case, and for retaining it, at least, until the claim proves unfounded."

And again (pp. 262-263):

"As was said in Martin vs. Hunter (1 Wheat. 363), 'the General Government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers.' It can act only through its officers and agents, and they must act within the States. If, when thus acting and within the scope of their authority, those officers can be arrested and brought to trial in a State Court, for an alleged offense against the law of the State, yet warranted by the Federal authority they possess, and if the General Government is powerless to interfere at once for their protection,—if their protection must be left to the action of the State Court,—the operations of the General Government may at any time be arrested at the will of one of its members. The legislation of a State may be unfriendly. It may affix penalties to acts done under the immediate direction of the National Government, and in obedience to its laws. It may deny the authority conferred by those laws. The State Court may administer not only the laws of the State but equally Federal law, in such a manner as to paralyze the operations of the Government. And even if, after trial and final judgment in the State Court, the case can be brought into the United States Court for review, the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledged Federal power arrested.

"We do not think such an element of weakness is to be found in the Constitution. The United States is a government with authority extending

over the whole territory of the Union, acting upon the States and upon the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. No State government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it."

In *Davis vs. South Carolina,* 107 U. S. 597, 27 L. ed. 574, 2 Sup. Ct. Rep. 636, the facts were these:

Davis was detailed to serve as one of a guard of the United States soldiers to aid the deputy marshal in making the arrest of one Hall under a warrant issued by the United States Commissioner, for violation of internal revenue laws, as a distiller. For the purpose of making the arrest the house of said Hall was surrounded by the guard. Davis was stationed at the back door of the house for the purpose of guarding the same and preventing the escape of said Hall. Hall made his escape through a hole in the side of the house near where Davis was standing, "sprang past him, frightening his horse, and accidentally discharging his piece."

"By the discharge of his said piece the said Hall was shot and mortally wounded, and subsequently died of said wound." Davis was indicted in the State Court for murder. The case was removed to the Federal Court, upon a petition setting forth the above facts and alleging that at the time of said accident Davis was in the discharge of his duty, and that the shooting of Hall was purely accidental, and Davis was in no way responsible therefor. Upon appeal to this Court, the removal of the case was approved.

In *Illinois vs. Fletcher*, 22 Fed. 776 (C. C., N. D., Ill.), there was an indictment against deputy marshals of the United States for a murder committed at a Federal election. There was a petition to remove the case from the State Court to the Federal Court.

The petition contained an averment that the indictment was found against the petitioners for acts done by them, *if done at all*, in their own necessary self defense, and while engaged in the discharge of their duties as deputy marshals of the United States.

Judge Gresham said (pp. 778-779):

> "They did the killing or contributed to it, or they did not; *and nothing short of a positive averment that they did the act for which they stand indicted,* and did it in the line of their duty as deputy marshals of the United States, or under the color of their authority as such officers, will entitle them to a removal of the case from the State Court to this Court for trial. The mere holding of a commission as a deputy marshal of the United States at the time a party is indicted for murder, or any other offense against the laws of a State is not of itself sufficient ground for depriving the State Court of jurisdiction of the case.
>
> "The petitioners state that James Smith, their co-defendant in the indictment, and also a deputy United States marshal and a number of other persons, incited thereto by special constables of Cook County, were engaged in a disturbance and a breach of the peace at the polls; that Smith was threatened by the special constables, and such other persons, with personal violence; that, 'in order to quell said disturbance and protect said Smith and to preserve order at the polling place,' they, the petitioners, took Smith into custody; that while proceeding with him to the office of Philip Hoyne, a Commissioner of the United States, there to make complaint

against him 'for disturbing the peace at said polling place', they were fired upon by a large body of armed men including Curnan, the deceased, who demanded that Smith should be taken to the Harrison Street Police Station in the City of Chicago, and threatened both them and Smith unless he was taken there; and that, refusing to comply with this demand, they were fired upon, and some one of the attacking party, shot and killed Curnan. It is not claimed by the District Attorney, who appears for the petitioners that Smith was in the line of his duty as a deputy marshal when he was engaged in a breach of the peace at the polls, or that he had committed an offense against the United States for which Commissioner Hoyne might have held him for trial or for which any Court of the United States had jurisdiction to try and punish him. Instead of doing his duty as a deputy marshal, Smith was engaged in a disturbance and breach of the peace at the polls. The petitioners had a right to arrest him for this offense, and in a reasonable time, turn him over to the proper State authorities. He was simply a law breaker and the fact that he was a deputy marshal of the United States entitled him to no more consideration or protection than others engaged in the same disturbance and breach of the peace. The District Attorney admits that there is no Federal statute making a disturbance at the polls amounting to a breach of the peace an offense against the United States. *This is not a case in which deputy marshals of the United States in repelling force by force in defense of themselves or their prisoner shot and killed an assailant.* Smith had violated the laws of the State and the petitioners refused to turn him over to the State authorities. They held him, it may fairly be inferred, to protect him because he was a deputy United States Marshal, and to take him before Commissioner Hoyne, who had no jurisdiction to hear a complaint against him or to detain him." (Italics ours.)

In *Salem & L. R. Co. vs. Boston & L. R. Co.*, 21 Fed. Cases, p. 228, Federal Case No. 12249, it was held that an application for a writ of certiorari to remove a case from a State Court to the Circuit Court of the United States, under the Act of Congress of March 2, 1883 (4 St. 632), must state facts sufficient to enable the Court to decide whether the case is one within the provisions of the Act. It is not enough that the petitioner alleges in general terms that he intends to rely in his defense to the suit upon revenue laws of the United States.

A just interpretation of the Act does not authorize a writ of certiorari upon a statement of the mere opinion of the petitioner and his counsel that the act was done under color of the office of an agent under the revenue laws of the United States.

Facts, not mere opinions or conclusions of law, should be set forth, so that it may appear whether in judgment of law such a case exists as enables the petitioner to call for removal.

Virginia vs. Dehart, 119 Fed. 626 (C. C., W. D., Va.):

Criminal prosecution removed from State Court. Motion to remand. Denied. Ground of motion that petition did not allege a state of facts necessary to give the Court jurisdiction.

Petition alleged that petitioner, while acting as a posseman under a deputy collector of internal revenue, had assisted in destroying an illicit distillery belonging to one N. K. Thomas; that he appeared as a witness and had testified against Thomas at the preliminary hearing, and was recognized as a government witness to appear and testify against Thomas at the next term of the Federal Court. At this juncture—between the examining

trial and the term of court at which Thomas was to be tried for operating an illicit distillery—the petitioner was summoned by a deputy United States Marshal to assist in an effort to arrest one Agee for a violation of the Federal Revenue Law.

> "While in the discharge of such duty, and while acting under and by authority of said officer, your petitioner was set upon by said N. K. Thomas, who told your petitioner that, on account of his having reported said Thomas' still to the said Government officers and on account of his having, while acting under and by authority of a deputy collector of the United States, assisted in the cutting up and destruction of said Thomas' still, and on account of the evidence given by your petitioner against him before the Commissioner and to prevent such evidence being repeated by your petitioner at the November Term of said District Court, he intended to kill your petitioner. As he said this, said N. K. Thomas thrust his hand in his pocket and drew therefrom a pistol. Your petitioner, acting in the capacity of a Government officer, also had on his person a pistol, which he drew from his pocket, and, without attempting to fire on the said N. K. Thomas, struck him in self defense, and thereby prevented the said N. K. Thomas from carrying out the threats made not only at that time, but on previous occasions."

It was held that a person acting under a deputy marshal while executing, or on the way to execute, a warrant for the arrest of one charged with a violation of an internal revenue statute, is "an officer acting by authority of a revenue law," if the prosecution is on account of an act done under color of office or of any revenue law or if the prosecution is on account of any right or authority claimed under any revenue law; that the mere fact that the assault made by Thomas on the petitioner grew out of the prior actions of the petitioner while acting under

the deputy revenue collector would not make it one done under color of office or of any revenue law; also, where the officer is not engaged in any official duty, and is attacked because of some act *previously* done by him in the performance of his official duty, he would not be acting under color of his office or of any revenue law. In both of the above cases he would be merely exercising the right of self-defense.

However, where as in this case an attack is made on a revenue officer while he is in actual pursuit of a violator of the revenue laws, by a third party actuated by mere personal malice toward the officer, and the officer, in repelling the attack wounds or kills the person attacking him, such act is one done, at least colorably in the line of official duty, nor can a distinction be properly drawn, if instead of being in actual pursuit, the officer is merely on the way to make an arrest, or merely seeking an offender with intent to arrest him when found.

Virginia vs. Felts, 133 Fed. 85 (C. C., W. D., Va.):

The petitioner, a deputy United States Marshal, was indicted in the State Court for murdering one Vaughn and wounding with intent to kill one Alford. Petition for removal. Motion to remand. Denied.

The petition alleges that Felts was on a train, in the course of his official duties, on his way to serve warrants upon two persons charged with violations against Federal statutes. On the train he met Vaughn and Alford who, on account of previous acts of the petitioner in connection with his duties as deputy marshal, had conspired to murder said petitioner.

Vaughn and Alford viciously attacked him, and in defending himself against the said assault he found it

necessary to shoot and kill the said Vaughn and wound the said Alford. It is further stated that "in consequence of said assault and interference on the part of the said Vaughn and Alford, he was hindered and prevented from discharging his duty as such officer as required by the process aforesaid."

In discussing the manner of contesting the jurisdiction of the Court in such cases, the Court said (p. 89):

> "Where an objection to the jurisdiction of the Federal Court appears on the face of the removal papers, the point is raised by a motion to remand. But when the party resisting the removal desires to contest the truth of some essential jurisdictional fact," set forth in the petition, this issue may be determined preliminary to the hearing of the case on the merits.

(p. 90): "While a plea to the jurisdiction is not necessary (where a jurisdictional fact in the petition for removal is denied), for the Court will *sua sponte* remand the case if, after the evidence is in, it appears that it has not jurisdiction, yet the better practice is to file such a plea.

"Such a plea, with replication, raises an issue of fact." This should be submitted to the jury, subject to the right of the Court to direct a verdict on this issue when proper.

(p. 91): "Ordinarily, in Courts of general jurisdiction pleas in abatement are not favored and must be filed at an early stage in the proceedings. The Federal Courts are, in some sense of limited jurisdiction, and will remand a removed cause at any stage of the case if it appears that the Court has not jurisdiction. It follows that the ordinary technical

rules as to the time of filing the pleas in abatement do not apply in removal cases. If offered too late to have the issue tried by the jury, the effect can be obtained by a motion to remand which the Court can pass upon after hearing the evidence."

"On the issue raised by the plea to the jurisdiction the burden of proof is on the petitioner."

People's U. S. Bank vs. Goodwin, 162 Fed. 937 (C. C., E. D., Mo.):

This action was instituted in a State Court to recover damages for an alleged libel charged to have been wrongfully and maliciously written, composed and published by the defendants, an Assistant Attorney General for the Post Office Department and an inspector of such department. The libel was based on the promulgation by them of a fraud order against the plaintiff. It was sought to remove the case to the Federal Court by certiorari under *Section 33 of the Judicial Code.* The Court, in holding that the action was not removable, said (p. 945):

"In my opinion, to permit the removal of the cause under this section of the law, the acts which constitute the cause of action must have some rational connection with official duties 'under a revenue law,' and in some way affect the revenue of the Government. It could hardly be claimed that * * * a revenue collector, if sued for some act claimed to have been committed, in the performance of his official duties, would have the right to remove the cause under Section 643 (R. S.) if neither the declaration nor the petition for certiorari showed that the act for which he was sued was in fact in the performance of an official duty imposed on him by law, having some relation to the collection of revenue for the Government. These facts must appear on the face of the complaint in the action or in the petition for the writ of certiorari, otherwise a National Court is without jurisdiction. (Citing *Vir-*

ginia vs. Rives and *Virginia vs. Paul, supra*). To merely state the opnion of the petitioner or his counsel that such a question is involved is insufficient to justify the granting of the writ."

State of Alabama vs. Peak, 252 Fed. 306 (D. C., S. D., Ala.):

Peak was indicted in the Alabama State Court for grand larceny and the cause was removed to the Federal Court on petition under *Section* 33 *of the Judicial Code.* A motion to remand was denied.

The petitioner in this case denied in his petition that the larceny was committed; and alleged that at the time of the alleged act for which he was indicted, he was an officer duly appointed under and acting by authority of, a revenue law of the United States, that is to say, he was a narcotic inspector duly appointed and acting under the Harrison Narcotic Act, which is an internal revenue law; that he was assigned as such inspector in charge of the States of Tennessee and Alabama; that he was in Mobile, Alabama, and surrounding territory, acting under orders for the purpose of investigating violations of the said Act, as well as other internal revenue laws, including the laws in reference to vinous, spirituous or malt liquors; that he was investigating violations of the internal revenue laws about seven or eight miles from Mobile, Alabama, and was on his way back to Mobile to report the same to his superior officer, when the alleged act for which he was indicted occurred; that is to say, on his return journey he encountered one James W. Lenford, who was in an automobile with his chauffeur and others; that said Lenford afterwards claimed that he had been robbed of some money while on said journey and when he reached Mobile had warrants issued for the petitioner and two chauffeurs, but petitioner denies that

he was guilty, on that or any other occasion of any act of grand larceny, of Lenford's or anyone else's money, but that the whole course of his conduct and acts on said occasion was in the performance of his official duty as aforesaid.

The removal was contested upon the ground that the petitioner alleged that he "did not feloniously take and carry away said sum of money or any other sum," and further denied that he was "guilty of any act of grand larceny or the felonious taking of Lenford's or anyone else's money." It was contended that under the ruling in *Illinois vs. Fletcher, supra,* the case must be remanded. But the Court said (pp. 307-308):

> "In the first place, it occurs to me that the State's Attorney overlooked a distinction between the denial of an act and a denial of the criminality of such act; in other words, that where a petitioner denies that he was guilty of grand larceny, or the felonious taking of money, this is merely a denial that the act as done was a criminal one, and distinctly constituted a denial that the taking was a felonious one, in that there was no felonious intent in the taking. If the petitioner was required to specifically admit the facts as charged in the indictment, and the intent also charged, this would amount to a plea of guilty, and there would be nothing to try in the Federal Court. All that would be required would be to enter judgment."

The Court then holds (contrary to the weight of authority, we believe) that it is unnecessary for the petition to set out the facts which it is averred constituted the acts for which the petitioner was indicted, but it was also held that if the facts are set out they should be sufficient to establish the right of removal claimed by the petitioner.

The Court makes this distinction between the case before it from *Illinois vs. Fletcher:*

In *Illinois vs. Fletcher* the facts constituting the act upon which the indictment was based were set out in the petition; in the *Peak* case the petition does not undertake to set out the facts which transpired at the time the petitioner was accused in the indictment of taking Lenford's money. The Court sustained the petition upon the ground that it set up in general terms that the whole course of the petitioner's conduct and acts on said occasion was a performance of his official duties as a revenue officer.

In the course of the opinion, the Court stated the proposition upon which we rely in this case, in the following language (p. 309):

> "Certainly the officer *must admit the doing of some act under color of his office or of the law for which he is indicted* but he is not required to admit the doing of the act as *charged* in the indictment." (Italics ours.)

It is respectfully submitted that the *Peak* opinion is unsound because it is based upon the erroneous assumption that the petition need not set forth affirmatively facts which it is averred constitute the acts upon which the indictment is based. But, assuming the facts to have been stated, it is clear that this case is in accord with the other decisions upon the same subject. It requires, as a condition precedent for removal, the admission by the officer that the indictment arose out of some act done by him under color of his office, or under color of the revenue law, although the criminality of the act or the accuracy or correctness of the statement thereof in the indictment may be denied. In other words, there must be a "confession and avoidance."

That this is the basis for the decision is borne out by the following language (p. 311):

> "It is urged that there can be no right of removal where one is charged with a larceny, because there could be no possible connection between the official capacity of a revenue officer and the felonious taking of money or property. This proposition is so manifestly unsound that I think it needs but one statement to refute it. Suppose a revenue officer finding money or property in the possession of a man he was pursuing or seeking to make a case against, and he abstracts this money or property to be used as evidence in a prosecution against the person in whose possession it was found. Unexplained, the taking and carrying away by the officer of the money would constitute larceny, but, when it was shown that it was taken and carried away for the purpose of being preserved and used in the prosecution of such person, there would be no criminality in the act."

Oregon vs. Wood, 268 Fed. 975 (D. C., Oregon):

This case holds that it is not enough that the petition for removal, under *Section 33 of the Judicial Code*, alleges, in general terms, that the petitioner intends to rely in his defense to the prosecution upon the revenue laws of the United States. "The statute requires that the petition shall set forth the nature of the action or prosecution" (p. 978).

The petition averred (1) that the petitioners were officers appointed under the revenue laws of the United States, by the Commissioner of Internal Revenue; (2) that prosecution was commenced in the State Court against the petitioners and others, wherein the grand jury of such court indicted the petitioners for involuntary manslaughter and charged that petitioners, while in the performance of a lawful act, killed one Hedderly

by shooting him, which indictment is still pending, no trial having been had; (3) that petitioners did not kill Hedderly; (4) that at the time of the occurrence of the act for which petitioners were indicted they "were and still are officers of the United States as aforesaid" and were acting as such officers and under color of their office, to wit: attempting to effect the arrest of Hedderly; (5) that petitioners believe Hedderly was in the act of violating the revenue and prohibition laws of the United States, and for that reason the arrest was attempted; (6) that such attempted arrest was the same act as referred to in the indictment as the performance by petitioners of their lawful act.

It was held that it was not necessary that the officers state more fully the capacity in which they were acting or why petitioners attempted to make the arrest or what revenue laws they were acting under or that such laws were still in force, or what particular acts Hedderly was engaged in at the time.

Smith vs. Gillian, 282 Fed. 628 (D. C., W. D., Ky.):

In this case a civil action was sought to be removed under the provisions of *Section 33 of the Judicial Code*. The petition stated that the petitioners on a date stated, under orders of the Federal Prohibition Director for the State of Kentucky, proceeded to Nelson County, Kentucky, where they were engaged in the performance of their official duties in an effort to suppress the violation of liquor laws and to arrest those guilty of such violations; that while so engaged in the performance of their official duties in close proximity to where a moonshine distillery was located they and other officers associated with them on that occasion were fired upon by the men who were engaged in the violation of the Prohibition Act and certain sections of the Revised Statutes of the United

States "in the setting up and operation of the distillery"; that in order to protect themselves from an attack by those persons after they had been fired upon as stated, "certain of the officers named" returned the fire; and that in the exchange of shots it was afterwards learned that Francis Marion Smith, husband of the plaintiff, Lucy Smith, and the father of her co-plaintaiffs, was shot and killed. The Court said (p. 635):

> "It may, at the outset, be most suggestive and important to note that neither in the original petition of the defendants nor in the statement filed later was it, in any affirmative way stated or adequately shown that the presumptively innocent Francis Marion Smith was himself to any extent 'engaged' either in the 'manufacture or sale of intoxicating liquor,' within the meaning of that phrase as used in *Section* 28, *of the National Prohibition Act.* Furthermore it is most important to note that no case to which that phrase is not applicable can by any means be brought within Section 28 of the Act."

The case was remanded upon the ground that under the removal statute, the right to remove is not conferred upon Federal Prohibition Officers.

Commonwealth of Massachusetts vs. Bogan, 285 Fed. 668 (D. C., Mass.):

The petition for removal in this case alleged that the petitioner, while he was engaged in the performance of his duty, was attacked by one Sequeria and shot him fatally in self-defense.

A prosecution, based upon this act of self-defense, pending in the State Court, was ordered to be removed by the District Court.

It will be observed that in every one of the cases cited the petitioner alleged, either expressly or by the clearest

inference, some act done by him under color of his office or under color of some revenue law which resulted in the prosecution.

In other words, in every case, there was either a confession of the act charged in the indictment and the denial of its criminality, or the setting up of some independent overt act alleged to constitute the act under color of office for which the petitioner was indicted.

It is respectfully submitted:

THAT THE REMOVAL ACT APPLIES ONLY WHERE THE ACT WHICH IS THE BASIS OF THE ACTION OR PROSECUTION HAS SOME RATIONAL CONNECTION WITH OFFICIAL DUTIES UNDER A "REVENUE LAW," AND IN SOME WAY AFFECTS THE REVENUE OF THE GOVERNMENT, AND THAT IN THIS CASE THE AMENDED PETITION WHICH SETS FORTH IN DETAIL THE FACTS UPON WHICH THE PETITIONERS RELY, DOES NOT MEET THE JURISDICTIONAL REQUIREMENTS FOR THE REMOVAL OF THE PROSECUTION, EVEN THOUGH THIS COURT MAY BE OF THE OPINION THAT IN A PROPER CASE THE REMOVAL ACTS ARE APPLICABLE TO OFFICERS SUCH AS THOSE DESCRIBED IN THE PETITIONS FOR REMOVAL FILED IN THIS CASE.

CONCLUSION.

It has been the universal practice (probably under the authority of the *Rev. St. Sec.* 771; *U. S. Comp. St.* 1916, *Vol.* 2, *Sec.* 1296, *p.* 2156), for the United States District Attorney to appear in the Federal Court on behalf of revenue officers in all prosecutions against them removed

from the State Courts. The United States District Attorney, who daily appears before the petit juries in the District Court as the prosecuting officer, in these special cases changes his role from prosecutor to defense counsel, and urges the acquittal of defendants, accused of serious crimes against the sovoreignty of the State government.

Certainly, this change of front upon the part of the District Attorney must have its effect upon the jury. The jurymen, who have probably learned to trust and respect the District Attorney, undoubtedly will give more credence to what he says in defense of the accused, especially when his usual and customary plea is for conviction. If he asks in some special case for an acquittal, there must indeed be some special circumstances to justify such action upon his part.

In removed criminal prosecutions even the Federal Judge, who hears the case and determines the punishment if there is a conviction, is expected to lean more favorably toward the accused than in the ordinary criminal case coming before him.

And this should be so, because the very purpose of the removal statute is to afford protection to those officers embraced within it in the performance of their official acts. There is, and ought to be a strong presumption that any act done in the course of official duties is within the scope of the officer's authority under the law.

Thus in the trial of removed prosecutions in the Federal Court, the atmosphere is surcharged with kindliness, leniency and protection to the accused.

It is, therefore, meet that the right of removal be strictly limited to those cases in which the accused is entitled to the benefit of such pre-disposition toward

him, that is to say, to cases where the prosecution has arisen out of an act done under the semblance, at least, of the authority conferred upon the officer by the law.

The removal statute aims to protect officers who have, in good faith, attempted to enforce at least what they consider to be their duty under the law, and not to protect them in acts committed by them in their private capacity, having no rational connection with their duties.

The protection of the removal act has its historical inception in the effort of a State to nullify revenue laws of the Government, and this historical purpose should always be borne in mind in the application of said statute by the Courts.

Is the action of the State authorities in commencing a prosecution calculated to embarrass the Federal Government in the execution of its revenue laws? That is the test to be applied in every case in which removal of a prosecution is attempted.

We respectfully submit that in the case at bar the defendants in the indictment in the State Court have not shown that they are revenue officers within the meaning of the removal statute, nor have they shown by their petition that the prosecution which they seek to remove is embraced within the terms of said Act.

Judge Soper and the District Court, in removing this prosecution from the State Court have clearly exceeded the authority vested in them under the Act. Under the precedents in this Court, hereinbefore cited, this Court is vested with jurisdiction to compel the remand of the

prosecution to the State Court, and we respectfully and earnestly request that this be done.

Respectfully submitted,

THOS. H. ROBINSON,
Attorney General,

HERBERT LEVY,
Assistant Attorney General,

Attorneys for the State of Maryland,

Petitioner.

APPENDIX.

SECTION 33, JUDICIAL CODE, R. S. SEC. 643; ACT, MARCH 3, 1875, C. 130, SEC. 8, 18 STAT. 401; ACT, FEBRUARY 8, 1894, C. 25, SEC. 1, 28 STAT. 36; ACT, MARCH 3, 1911, C. 231, SEC. 33, 36 STAT. 1097; ACT, AUGUST 23, 1916, C. 399, 39 STAT.:

"When any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of such law, or on account of any right, title, or authority claimed by such officer or other person under any such law, or is commenced against any person holding property or estate by title derived from any such officer and affects the validity of any such revenue law, or against any officer of the courts of the United States for or on account of any act done under color of his office or in the performance of his duties as such officer, or when any civil suit or criminal prosecution is commenced against any person for or on account of anything done by him while an officer of either House of Congress in the discharge of his official duty in executing any order of such House, the said suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the district court next to be holden in the district where the same is pending upon the petition of such defendant to said district court and in the following manner: Said petition shall set forth the nature of the suit or prosecution and be verified by affidavit and, together with a certificate signed by an attorney or counselor at law of some court of record of the State where

such suit or prosecution is commenced or of the United States stating that, as counsel for the petitioner, he has examined the proceedings against him and carefully inquired into all the matters set forth in the petition, and that he believes them to be true, shall be presented to the said district court, if in session, or if it be not, to the clerk thereof at his office, and shall be filed in said office. The cause shall thereupon be entered on the docket of the district court and shall proceed as a cause originally commenced in that court; but all bail and other security given upon such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the State court. When the suit is commenced in the State court by summons, subpoena, petition, or any other process except capias, the clerk of the district court shall issue a writ of certiorari to the State court requiring it to send to the district court the record and the proceedings in the cause. When it is commenced by capias or by any other similar form of proceeding by which a personal arrest is ordered, he shall issue a writ of habeas corpus cum causa, a duplicate of which shall be delivered to the clerk of the State court or left at his office by the marshal of the district or his deputy or by some other person duly authorized thereto; and thereupon it shall be the duty of the State court to stay all further proceedings in the cause, and the suit or prosecution, upon delivery of such process, or leaving the same as aforesaid, shall be held to be removed to the district court and any further proceedings, trial, or judgment therein in the State court shall be void. If the defendant in the suit or prosecution be in actual custody on mesne process therein, it shall be the duty of the marshal, by virtue of the writ of habeas corpus cum causa, to take the body of the defendant into his custody, to be dealt with in the cause according to law and the order of the district Court, or, in vacation, of any judge

thereof; and if, upon the removal of such suit or prosecution, it is made to appear to the district court that no copy of the record and proceedings therein in the State court can be obtained, the district court may allow and require the plaintiff to proceed de novo and to file a declaration of his cause of action, and the parties may thereupon proceed as in actions originally brought in said district court. On failure of the plaintiff so to proceed, judgment of non prosequitur may be rendered against him, with costs for the defendant."

(17)

NO. 23, ORIGINAL.

IN THE

Supreme Court of the United States.

STATE OF MARYLAND

versus

MORRIS A. SOPER, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND, AND THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

CASE "A."

REPLICATION.

MR. CLERK:

Please file.

THOMAS H. ROBINSON,
Attorney General of Maryland,

HERBERT LEVY,
Assistant Attorney General of Maryland,
Attorneys for the State of Maryland.

The Daily Record Co. Print, Baltimore, Md.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 23, ORIGINAL.

STATE OF MARYLAND

versus

MORRIS A. SOPER, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND, AND THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

CASE "A."

REPLICATION.

And the said State of Maryland says that the matters and things set forth and alleged in the answer and return of the said Morris A. Soper, Judge of the District Court of the United States for the District of Maryland, and of the District Court of the United States for the District of Maryland, to the rule on them laid by this Honorable Court to show cause why a writ of mandamus should not issue in accordance with the prayer of the petition of the said State of Maryland, SHOW NO CAUSE why the writ of mandamus should not be issued by this Court, forbidding and preventing the said Morris A. Soper, Judge of the District Court of the United

States for the District of Maryland and the said District Court, from taking cognizance of the case entitled "State of Maryland vs. Robert D. Ford, John M. Barton, E. Franklin Ely, Wilton L. Stevens and William Trabing," and from any, all and every act connected with the trial of said case, and commanding them to remand the said case to the Circuit Court for Harford County, and to redeliver to the jailor for said Harford County, the bodies of the said Robert D. Ford, John M. Barton, E. Franklin Ely, Wilton L. Stevens and William Trabing, to be dealt with according to the laws of said State.

WHEREFORE, the said State of Maryland prays this Honorable Court to issue its writ of mandamus to the said Morris A. Soper, District Judge, as aforesaid, and to the said District Court, commanding them to do so.

THOMAS H. ROBINSON,
Attorney General of Maryland,

HERBERT LEVY,
Assistant Attorney General of Maryland,
Attorneys for the State of Maryland.

In the Supreme Court of the United States

OCTOBER TERM, 1925

NO. 23, ORIGINAL

EX PARTE: IN THE MATTER OF THE STATE OF MARYLAND

CASE "A"

PETITION FOR A WRIT OF MANDAMUS TO THE DISTRICT COURT FOR THE DISTRICT OF MARYLAND

RETURN TO RULE

The answer and return of Morris A. Soper, Judge of the District Court of the United States for the District of Maryland, and of the District Court of the United States for the District of Maryland, to the rule on them laid by this Honorable Court to show cause why a writ of mandamus should not issue in accordance with the prayer of the petition.

The respondents, answering, say:

(1) All the acts of which petitioner complains were the acts of the respondent, the District Court of the United States for the District of Maryland.

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Of this Court the respondent, Morris A. Soper, at all times herein material, was, and still is, the duly appointed judge.

(2) On February 11th, 1925, a petition was presented to the said District Court by Robert D. Ford, John M. Barton, E. Frank Ely, Wilton L. Stevens, and William Trabing. In it the petitioners set forth that they had been indicted, on February 10th, 1925, in the Criminal Court of the State of Maryland for Harford County, for the murder of one Lawrence Wenger; that the petitioner Trabing was a chauffeur engaged and employed by the Federal Prohibition Director of the State of Maryland, and that the other four petitioners were officers of the Internal Revenue Service of the United States; that the acts done by Trabing at the time of the alleged murder were done while he was acting under the authority of the Prohibition Director and of the other four petitioners and in discharge of his duty as a helper to the other petitioners; that the acts done by the other four petitioners were done in the discharge of their official duties, and that the prosecution in the State Court was on account of acts alleged to have been done in the course of the performance of the petitioners' duty as Federal Prohibition Agents. The petitioners prayed that the prosecution be removed to the District Court of the United States, under Section 33 of the Judicial Code. The contents of this petition are set forth in Exhibit A to the peti-

tion of the State of Maryland for a writ of mandamus, at pages 18–21.

(3) Upon consideration of this petition, it was ordered by the District Court that writs of certiorari and habeas corpus cum causa should issue to remove the prosecution from the State Court. In obedience to these writs, the record in the State Court was, on February 21st, 1925, transmitted under protest to the District Court; and the petitioners were admitted to bail by the District Court.

(4) On March 12th, 1925, the State of Maryland, appearing specially in the District Court, moved to quash the writ and rescind the order of removal, and moved also to remand the cause to the State Court, for reasons set forth in the motion. This motion is fully set forth in Exhibit A to the petition of the State of Maryland for a writ of mandamus, at pages 25–26.

(5) After hearing full argument upon this motion, the District Court, on March 17th, 1925, granted leave to the United States, on behalf of the accused, to amend the petition for removal.

(6) On March 31st, 1925, pursuant to the leave granted, an amended petition for removal was filed. This petition set forth in full all the attendant circumstances and details surrounding the alleged murder for which the petitioners were indicted. The amended petition recited these facts: On November 19th, 1924, the petitioners had proceeded, under orders, to discover and destroy an illicit still

in the woods near the village of Madonna, Maryland. After destroying this still, the petitioners started to return to their car, when they found the deceased, Lawrence Wenger, lying mortally wounded some 400 or 500 yards from the site of the still. They took him in their car and endeavored to obtain medical aid. At length they found a physician, who pronounced Wenger dead. The petitioners then reported the affair to the State's Attorney, who forthwith had them arrested. They spent that night in jail. The next day they repeated their account to the State officials and to the Coroner's Jury. In the evening they were released on bail. Their indictment, set forth at length in the petition, followed later. The petition concluded by stating:

> The said indictment is now pending in the Circuit Court for Harford County and is a criminal prosecution on account of acts alleged to have been done by your petitioners at a time when they were engaged in the performance of their duties as Federal Prohibition Officers and chauffeur for Federal Prohibition Officers as set forth in aforegoing paragraphs.

Removal of the prosecution was again prayed, under Section 33 of the Judicial Code. The contents of this petition are fully set forth in Exhibit A to the petition of the State of Maryland for a writ of mandamus, at pages 28–34.

(7) Upon consideration of this amended petition, it was again ordered by the District Court

that writs of certiorari and habeas corpus cum causa should issue to remove the prosecution from the State Court.

(8) On April 11, 1925, the State of Maryland, again appearing specially, moved to quash the writ and rescind the order of removal, and moved also to remand the cause to the State Court. The reasons set forth in support of this motion were:

(1) Because the allegations of the second paragraph of the amended petition are untrue.

(2) Because the allegations of the petition filed in this case do not disclose a state of facts entitling the petitioners to have said writ issued or the charge against them removed into this Court.

(4) Because the issuance of said writ upon the allegations of said petition and attached certificate of counsel is beyond the power and jurisdiction of this Court as limited by the Constitution and laws of the United States.

(5) Because the said writ, if allowed to stand, constitutes an interference by this Court with the due and orderly administration of justice in the Circuit Court for Harford County contrary to the Constitution and laws of the United States.

(6) Because there is no allegation in said petition that authorizes this Court to issue any writ whatsoever against the Judge or the Clerk of the Circuit Court for Harford County.

(7) And for other good and sufficient reasons to be shown at the hearing.

The motion is set forth in full in Exhibit A to the petition of the State of Maryland for a writ of mandamus, at pages 36–37.

(9) On May 5th, 1925, after hearing full argument, the District Court overruled the motion of the State of Maryland and ratified its former order of February 11th, 1925, removing the prosecution from the State Court.

(10) In ordering the removal of the prosecution, and in denying the motion to remand, the District Court was of the opinion that the petitioners were entitled to removal under that portion of Section 33 of the Judicial Code, which authorizes removal—

> when any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law.

And the District Court was further of the opinion that the petitioners were entitled to removal, even in the event that they were not " revenue offi-

cers," by virtue of Section 28 of the National Prohibition Act (Act of Oct. 28, 1919, c. 85, 41 Stat. 305, 316), which provides:

> The commissioner, his assistants, agents, and inspectors, and all other officers of the United States, whose duty it is to enforce criminal laws, shall have all the power *and protection* in the enforcement of this Act or any provisions thereof which is conferred by law for the enforcement of existing laws relating to the manufacture or sale of intoxicating liquors under the law of the United States.

(11) The District Court was further of the opinion that the petitioners, at the time of the acts which gave rise to this indictment, were acting in the performance of their official duties in the enforcement of the National Prohibition Act and of other laws of the United States relating to the manufacture of intoxicating liquors (particularly Revised Statutes 3257–3260, 3276, 3278, 3281, and 3282).

(12) The District Court was further of the opinion that the facts set forth in the amended petition clearly disclosed that a prosecution had been commenced against the petitioners on account of acts done under color of their office and of the revenue and prohibition laws of the United States, notwithstanding that the petitioners did not admit having caused the death of Wenger.

(13) The District Court therefore adjudged that, under the facts of the case, it possessed ample jurisdiction to order the removal of the prosecution from the State Court and ample jurisdiction to proceed with the trial of the cause, which it intends to do.

(14) The respondents assert that upon the record established by the amended petition for removal and by the motion of the State of Maryland to remand the District Court had lawful jurisdiction to order the removal of the prosecution. In deciding upon the questions of law and fact raised by the amended petition for removal the District Court acted in the exercise of its judicial discretion and within the bounds of its lawful jurisdiction. And the respondents deny that the action of the District Court was a gross violation of the Constitution and laws of the United States or of the Constitution and laws of the State of Maryland. And the respondents deny that the District Court has either transcended its jurisdiction or usurped the jurisdiction of the State of Maryland.

And now these respondents, having made return to and fully answered the rule upon them laid, humbly pray that the rule may be discharged and that the petition of the State of Maryland may be dismissed.

Nevertheless, the respondents respectfully submit to and will abide the judgment of this Honorable Court and will enforce, by proper orders or

action, any direction given by this Honorable Court in the premises.

MORRIS A. SOPER,
Judge of the District Court of the United States for the District of Maryland.

WILLIAM D. MITCHELL,
Solicitor General.

WILLIAM J. DONOVAN,
Assistant to the Attorney General,
Counsel for the Respondents.

UNITED STATES OF AMERICA,

District of Maryland, ss:

Before me, Arthur L. Spamer, Clerk of the District Court of the United States for the District of Maryland, personally appeared on this day Morris A. Soper, Judge of the said Court, whose name is signed to the foregoing answer and return, who, being duly sworn by me, says that the same is true to the best of his knowledge, information, and belief.

Given under my hand and the seal of the said Court, this 13th day of November, 1925.

[SEAL.] ARTHUR L. SPAMER,

Clerk of the District Court of the United States

For the District of Maryland.

○

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In the Supreme Court of the United States

OCTOBER TERM, 1925

No 23, ORIGINAL

EX PARTE: IN THE MATTER OF THE STATE OF MARYLAND

CASE "A"

PETITION FOR A WRIT OF MANDAMUS TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND

BRIEF FOR RESPONDENTS IN SUPPORT OF RETURN TO THE RULE

GROUNDS OF JURISDICTION

This is an original petition by the State of Maryland for a writ of mandamus directed to the District Court of the United States for the District of Maryland, and to the Judge of that court. The jurisdiction of this Court is invoked under Section 234 of the Judicial Code (Act of March 3, 1911, c. 231, 36 Stat. 1087, 1156), which provides:

> The Supreme Court shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admi-

> ralty and maritime jurisdiction; and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States, where a State, or an ambassador, or other public minister, or a consul, or vice consul is a party.

On October 12th, 1925, this Court granted a rule to show cause why a peremptory writ should not issue. The rule was made returnable on or before November 16th, 1925.

STATEMENT

The purpose of the petition is to compel the District Court to remand to the Circuit Court of the State for Harford County an indictment charging four Federal Prohibition Agents and their chauffeur with the crime of murder. In Case "B" (Original No. 24), the State seeks to compel the remand of an indictment charging the same five defendants with conspiracy to obstruct justice. In Case "C" (Original No. 25), the State seeks to compel the remand of an indictment charging *one* of these defendants with perjury. Separate petitions and supporting briefs have been filed by the State in the three cases, "A," "B," and "C." To meet these, separate returns and supporting briefs will be filed by the respondents.

The facts in the present case, which involves a charge of murder, are these:

Four of the defendants (Ford, Barton, Ely, and Stevens) were duly appointed Federal Prohibition Officers. Their commissions empowered them—

> to act under the authority of and to enforce the National Prohibition Act and Acts supplemental thereto *and all Internal Revenue Laws relating to the manufacture, sale, transportation, control, and taxation of intoxicating liquors* * * * and to execute and perform all the duties delegated to such officers by law. (Exhibit A to Petition of the State of Maryland, pp. 40–41.)

The fifth defendant, Trabing, was a chauffeur. During the period covered by the indictment he was in the employ of the Federal Prohibition Director for the State of Maryland, and was acting as chauffeur and helper to the other four defendants. (Exhibit A to Petition of the State of Maryland, p. 41.)

On November 19th, 1924, the defendants were ordered by the Federal Prohibition Director for Maryland to investigate the alleged unlawful distilling of liquor on an unoccupied farm near the village of Madonna, Maryland. They went there by motor, arriving shortly after noon, and discovered in a secluded valley the materials for illicit distilling. They hid themselves in the woods.

Soon afterwards a number of men came up carrying a still. When the officers made their presence known, the men dropped the still and fled. The officers pursued, but failed to arrest anyone. They thereupon returned to the still, destroyed the materials, and proceeded back to their car to return to Baltimore and report the affair to their superior. On their way to the car, about 400 or 500 yards from the site of the still, they found a man (Wenger) lying mortally wounded. They picked him up and took him in their car to Jarrettsville and thence to Bel Air, in search of a doctor. By the time one was found, the man was dead. The officers then at once reported the matter to the State's Attorney in Bel Air. Upon learning that his informants were Prohibition Officers, the State's Attorney at once ordered all five to be placed under arrest. They were confined in the local jail that night, and the next day they gave further information to the State officials and to the Coroner's jury. The charges of conspiracy (Case "B") and perjury (Case "C") are predicated upon the testimony which they gave before the Coroner. On the evening of November 20th they were released on bail at the instance of the United States Attorney. (Exhibit A to Petition of the State of Maryland, pp. 30–32.)

In February, 1925, an indictment against the defendants for murder was returned by the Grand Jury of the State to the Circuit Court for Harford County. The defendants petitioned for removal of

the cause, under Section 33 of the Judicial Code. Removal was granted. Subsequently, the State of Maryland moved to quash the order of removal and to remand the prosecution to the State Court. After argument upon this motion, leave was granted to amend the petition for removal. The petition was accordingly amended to set forth in greater detail all the circumstances surrounding the indictment. Proper allegations were included stating that the defendants were Federal officers and that they had been acting in the discharge of their duties at the time when the alleged murder occurred. It was not admitted, however, that the defendants had actually shot Wenger, or that they had had anything to do with his death. It was alleged that the indictment for murder was—

> a criminal prosecution on account of acts alleged to have been done by your petitioners at a time when they were engaged in the performance of their duties as Federal Prohibition Officers and chauffeur for Federal Prohibition Officers as set forth in aforegoing paragraphs.

Upon this amended petition, removal was granted. The State of Maryland again moved to quash the order of removal and to remand the cause. Its motion was denied. To compel the District Court to remand the cause, the State is now seeking a writ of mandamus from this Court.

ARGUMENT

SUMMARY

I. THE PROSECUTION WAS PROPERLY REMOVABLE UNDER SECTION 33 OF THE JUDICIAL CODE, THE DEFENDANTS BEING "PERSONS ACTING BY AUTHORITY OF THE REVENUE LAWS."

II. EVEN IF THE DEFENDANTS ARE NOT REGARDED AS "REVENUE OFFICERS" IN THE TECHNICAL SENSE, THE PROSECUTION WAS NEVERTHELESS REMOVABLE UNDER SECTION 33 OF THE JUDICIAL CODE AND SECTION 28 OF THE NATIONAL PROHIBITION ACT (ACT OF OCT. 28, 1919, C. 85, 41 STAT. 305, 316).

III. THE PROSECUTION WAS REMOVABLE NOTWITHSTANDING THE FACT THAT THE DEFENDANTS DID NOT ADMIT THAT THEY HAD ANY PART IN THE KILLING OF WENGER.

IV. THE DECISION OF THE DISTRICT COURT GRANTING THE PETITION FOR REMOVAL, AND DENYING THE MOTION TO REMAND, WAS AN EXERCISE OF LAWFUL JUDICIAL DISCRETION, AND CAN NOT BE CONTROLLED BY MANDAMUS.

I

The prosecution was properly removable under Section 33 of the Judicial Code, the defendants being "persons acting by authority of the revenue laws."

Section 33 of the Judicial Code, as amended by the Act of August 23, 1916, c. 399 (39 Stat. 532) provides:

> That when any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right,

> title, or authority claimed by such officer or other person under any such law, * * * the said suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the district court next to be holden in the district where the same is pending upon the petition of such defendant to said district court and in the following manner: Said petition shall set forth the nature of the suit or prosecution and be verified by affidavit and, together with a certificate signed by an attorney or counselor at law of some court of record of the State where such suit or prosecution is commenced or of the United States stating that, as counsel for the petitioner, he has examined the proceedings against him and carefully inquired into all the matters set forth in the petition, and that he believes them to be true, shall be presented to the said district court, if in session, or if it be not, to the clerk thereof at his office, and shall be filed in said office. * * *

In the case at bar, four of the defendants are admitted to have been acting under commissions empowering them to enforce—

> the National Prohibition Act and Acts supplemental thereto *and all Internal Revenue Laws* relating to the *manufacture, sale, transportation, control, and taxation of intoxicating liquors* (*supra*, p. 3).

The fifth defendant, Trabing, was acting as chauffeur and helper to the four officers. He was at

all times acting under their orders and under the orders of their superior, the Prohibition Director for the State. His case clearly falls within the language of Section 33 of the Judicial Code, authorizing removal of prosecutions—

> *against any person acting under or by authority of any such officer.*

If the indictment against the four officers is removable, the indictment against Trabing is removable also. If the indictment against them is *not* removable, neither is that against Trabing. The five defendants stand on an equal footing, so far as removal is concerned. *Davis* v. *South Carolina,* 107 U. S. 597. This point, we understand, is not disputed by counsel for the State of Maryland, who apply the same language and arguments, throughout their petition and brief, to all five defendants alike.

The question therefore arises: Can these five defendants be regarded as "officers acting by authority of any revenue law of the United States," or as "persons acting under or by authority of any such officer"? It is submitted that at the time in question they were so acting.

At the time set forth in the indictment for murder, the defendants had been engaged in the search for an illicit still, and were on their way back to report its destruction. Their commissions empowered them to enforce not merely the National Prohibition Act but also the Internal Revenue Laws which dealt with intoxicating liquor.

There are many sections of the Revised Statutes, long anterior to the National Prohibition Act, which deal with the subject of illicit distilling. As examples may be mentioned: Rev. Stats. 3257, penalizing distillers who defraud the United States out of any tax; Rev. Stats. 3258, requiring all stills to be registered; Rev. Stats. 3259, penalizing all persons who set up stills without notice; Rev. Stats. 3260 and 3281, requiring distillers to give bonds, and penalizing those who fail to do so; and Rev. Stats. 3282, forbidding mash, etc., to be made or fermented save in a lawful distillery.

These sections are still presumably in force, having been revived by Section 5 of the Act of November 23, 1921, c. 134 (42 Stat. 222, 223). *United States* v. *Stafoff*, 260 U. S. 477. And their provisions were clearly applicable to the circumstances disclosed by this case. The defendants, while searching for an illicit still in the woods, were not acting merely to enforce the National Prohibition Act alone. They were acting equally to enforce the provisions of the older revenue laws. *United States* v. *Page*, 277 Fed. 459. Their power to make searches and seizures was derived not only from the National Prohibition Act but also from Rev. Stats. 3166, 3276, 3278, and 3332. Cf. *Steele* v. *United States* (case 2), 267 U. S. 505. Their commissions empowered them to act under both the old and the new laws alike.

The National Prohibition Act may or may not itself be a " revenue law " (*Lipke* v. *Lederer*, 259

U. S. 557); and Government officers relying on its provisions alone may or may not be " revenue officers " in the strictest technical sense. There are many provisions, even in the National Prohibition Act, which are clearly designed for the raising of revenue. But the older provisions of the Revised Statutes, at any rate, are revenue measures under which taxes may still be imposed. Congress may tax liquors, even though their production is forbidden. *United States* v. *Yuginovich,* 256 U. S. 450. And at any rate since the amendatory Act of 1921 (Act of Nov. 23, 1921, c. 134, 42 Stat. 222) Congress has clearly manifested its intention to do so. *United States* v. *Stafoff, supra.* Even if the defendants in this case had never been commissioned to enforce the Internal Revenue laws, they would none the less have been entitled to removal of a prosecution begun against them for acts alleged to have been committed while enforcing the revenue laws. The statute protects not merely " revenue officers," but also all officers " acting by authority of any revenue law," and all persons " *acting under or by authority of any such officer.*" A commission as a " revenue officer " is not a necessary requirement for removal of a prosecution. *Davis* v. *South Carolina,* 107 U. S. 597. And it is submitted that Government agents, holding commissions to enforce both the old and the new laws, are entitled in the case at bar to the same rights as " revenue officers," especially when they are shown to have been engaged in a type of duty (searching

for illicit stills) which arises under the revenue laws, and which has been carried on by revenue officers since the foundation of the Government. *United States* v. *Page*, 277 Fed. 459. Even if they are not themselves "revenue officers," the Commissioner of Internal Revenue is such an officer; and the defendants were clearly "persons acting under or by authority of" the Commissioner. So, in any event, their case is clearly covered by the language of Section 33 of the Judicial Code. And if they are entitled to the rights of revenue officers, it necessarily follows that, in proper cases, prosecutions against them are removable to the Federal Courts.

II

Even if the defendants are not regarded as "revenue officers" in the technical sense, the prosecution was nevertheless removable under Section 33 of the Judicial Code and Section 28 of the National Prohibition Act (Act of Oct. 28, 1919, c. 85; 41 Stat. 305, 316).

Even if it be conceded, however, that the defendants were neither "revenue officers" in the technical sense, nor persons "acting under or by authority of any such officer," it does not necessarily follow that their prosecution could not be removed from the State Court. It is submitted that prosecutions against *prohibition agents* are properly removable, as well as prosecutions against "*revenue officers.*"

Section 28 of the National Prohibition Act (Act of Oct. 28, 1919, c. 85; 41 Stat. 305, 316) provides:

> The commissioner, his assistants, agents, and inspectors, and all other officers of the United States, whose duty it is to enforce criminal laws, shall have all the power *and protection* in the enforcement of this Act or any provisions thereof which is conferred by law for the enforcement of existing laws relating to the manufacture or sale of intoxicating liquors under the law of the United States.

It is submitted that the " protection " extended to prohibition agents by this section includes the right to seek removal of prosecutions from the State Courts. Upon this point the views of the lower Federal Courts have been divergent. But the great majority support the Government's contention, and hold that prosecutions against prohibition agents are removable under the combined operation of this section and of Section 33 of the Judicial Code.

> *United States* v. *Pennsylvania*, 293 Fed. 931.
> *Massachusetts* v. *Bogan*, 285 Fed. 668.
> *Morse* v. *Higgins*, 273 Fed. 830, 832.
> *Oregon* v. *Wood*, 268 Fed. 975.

To the same effect is an opinion handed down on November 2, 1925, by the District Court for the Southern District of Illinois, in the case of *Illinois* v. *Moody et al.* This opinion has not yet been re-

ported. It is set forth in full in the Appendix, *infra,* page 35.

The only decisions to the contrary are *Smith* v. *Gilliam,* 282 Fed. 628, and *Wolkin* v. *Gibney,* 3 F. (2nd) 960. The latter of these cases merely cites the former as an authority, and assigns no independent reasons for the decision.

In *Smith* v. *Gilliam,* Judge Evans was of the opinion that the "protection" given by Section 28 did not include the right of removal. His opinion contains a careful examination of the earlier statutes dealing with the liquor traffic, and a summary of the powers of search and seizure conferred by those statutes upon revenue officers, omitting the removal statutes. He concludes, apparently, that the only "protection" afforded by Section 28 was the legal justification which resulted from the grant of power to make searches, seizures, and arrests. In other words, prohibition officers are given the "power" to make arrests in certain cases; therefore they are given "protection" (i. e., legal justification, which can be pleaded as a defense to an action for assault) while making such arrests.

It is submitted that such a conclusion robs the word "protection" of nearly all its meaning. The grant of power to an officer to make an arrest or a seizure carries with it, by necessary implication, the right to plead justification of law if sued for his acts. That right need not be meticulously set forth

in the statute. It is the inevitable concomitant of the grant of power. *In re Neagle,* 135 U. S. 1, 58.

"Protection" implies something more than the right to plead justification for acts done in pursuance of law. It implies also the right to conduct one's defense in a court where that defense can most properly be made. As was said in *Massachusetts* v. *Bogan,* 285 Fed. 668, 669:

> The right of removal therefore depends upon the correct construction of section 28 of the National Prohibition Act (41 Stat. 305), which confers upon them "all the power and protection in the enforcement of this act * * * which is conferred by law for the enforcement of existing laws relating to the manufacture or sale of intoxicating liquors under the law of the United States." The right now claimed is obviously not a "power" in the enforcement of the act. Is it a "protection?" The natural meaning of the word would be protection against resistance or attack when carrying out their duties; and there are provisions in the revenue laws to which it might apply. The danger, however, which such an officer would incur in the performance of his duties, if subject to prosecution or suit in local courts, in perhaps an unfriendly atmosphere and surroundings, might be very considerable. In the case of revenue officers it was recognized by Congress as sufficiently serious to require a right of removal of cases against them to the federal courts as a protection to them

> in the discharge of their duties. Every reason which exists for such right in the case of revenue officers exists with respect to prohibition officers.

The removal provisions of Section 33 of the Judicial Code are the lineal descendants of Section 3 of the Force Act of 1833, directed against Nullification in South Carolina (Act of March 2, 1833, c. 57; 4 Stat. 632, 633). The President's message on that occasion, after reciting the emergency and recommending that collectors of customs be authorized to use force to defend their possession of goods, goes on to say:

> This provision, however, would not shield the officers and citizens of the United States, acting under the laws, from suits and prosecutions in the tribunals of the State which might thereafter be brought against them, nor would it protect their property from the proceeding by distress, and it may well be apprehended that it would be insufficient to insure a proper respect to the process of the constitutional tribunals in prosecutions for offenses against the United States *and to protect the authorities of the United States, whether judicial or ministerial, in the performance of their duties.* (Richardson's Messages and Papers of the Presidents, vol. II, pp. 610, 630.)

The President therefore recommended, as a measure of protection to Federal revenue officers, the enactment of a suitable removal statute. His

recommendation was embodied in Section 3 of the Force Act.

In the debates on that Act in the Senate, Senator Frelinghuysen (a member of the Judiciary Committee which drafted and reported the bill) declared:

> The third section of the bill was defensive * * *. It had become indispensable to *protect* the United States' officers. (Debates in Congress, vol. 9, part 1, p. 329.)

Daniel Webster (likewise a member of the Judiciary Committee)—

> thought this the most important provision of the whole bill, as respects the *protection* of the federal officers * * *.
>
> We give a chance to the officer to defend himself where the authority of the law was recognized. (*Ibid.* 461.)

And Senator Wilkins (also a committee member):

> Said this section was indispensably necessary and by the amendment just adopted, was applied to the revenue laws only. The committee thought this would be a less offensive mode of *protecting* the officers of the Government than to take an appeal from the solemn judgment of the highest State tribunal, which last course had been particularly offensive to some States of the Union. (*Ibid.* 461.)

It is obvious, then, that the removal provisions of the Force Act were designed as a measure of

protection to the agents of the United States. They have been uniformly so regarded by the courts.

Davis v. *South Carolina*, 107 U. S. 597.
Tennessee v. *Davis*, 100 U. S. 257.
The Mayor v. *Cooper*, 6 Wall. 247, 253.
Massachusetts v. *Bogan*, 285 Fed. 668, *supra*.
In re Duane, 261 Fed. 242.
Peyton v. *Bliss*, Fed. Cas. No. 11055.
Findley v. *Satterfield*, Fed. Cas. No. 4792.
State v. *Hoskins*. 77 N. Car. 530.

In *Findley* v. *Satterfield*, *supra*, the court used language very similar to that employed half a century later in *Massachusetts* v. *Bogan*, *supra* (p. 14):

> Congress has power to levy and collect taxes and excises, and to make all laws necessary and proper to carry that power into execution. This includes the power to employ suitable officers and agents, *and to protect them from accountability in the state courts for acts done, or in good faith alleged to have been done, in the course of their duty. We can not say that this protection is not necessary and proper for the prompt and effective collection of the revenue.* It is obvious that where a local sentiment adverse to a particular revenue law could exert itself in irremovable prosecutions in the local courts against persons executing that law, the collection of the revenue might be seriously impeded. Congress has thought proper to guard against such impediments by the law that we are now consid-

> ering, and we are satisfied that it is a constitutional means to a constitutional end. (Italics ours.)

In *Peyton* v. *Bliss, supra,* it was pointed out by the Court that the only "revenue laws" generally known when the Force Act was passed were the customs laws. But the Force Act was held to be prospective in its operation and to apply to revenue laws, subsequently enacted, of a type unknown in 1833.

To grant "*protection*" to Federal officers by allowing them to remove prosecutions to the Federal Courts is therefore no new policy of the National government. This Court declared in *Tennessee* v. *Davis,* 100 U. S. 257, 262:

> As was said in *Martin* v. *Hunter* (1 Wheat. 363), "the general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers." It can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offence against the law of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their *protection*—if their *protection* must be left to the action of the State court,—the operations of the general government may at any time be arrested at the will of one of its members. The legislation of a State may be unfriendly. It may

affix penalties to acts done under the immediate direction of the national government, and in obedience to its laws. It may deny the authority conferred by those laws. The State court may administer not only the laws of the State, but equally Federal law, in such a manner as to paralyze the operations of the government. And even if, after trial and final judgment in the State court, the case can be brought into the United States court for review, the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledged Federal power arrested.

We do not think such an element of weakness is to be found in the Constitution. The United States is a Government with authority extending over the whole territory of the Union, acting upon the States and upon the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. No State government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it. (Italics ours.)

It is submitted that every reason which formerly existed for granting removal to revenue officers extends with equal force to the case of prohibition agents. If the language of Section 28 of the National Prohibition Act is to be given its reasonable

meaning, it must be interpreted as granting the right of removal to officers acting under its provisions. The weight of Federal decisions supports this view; and it is submitted that those decisions are sound.

III

The prosecution was removable notwithstanding the fact that the defendants did not admit that they had any part in the killing of Wenger.

It is argued on behalf of the State of Maryland that the prosecution was not properly removable because the defendants did not admit having committed the murder for which they stand indicted. Counsel for the State concede that removal would have been proper if the defendants had confessed that they killed Wenger, and had proceeded to justify the killing under some provision of the Internal Revenue laws. But because the defendants admitted no connection with the killing—because they stated merely in their petition that they had found the body, that they had forthwith reported the matter to the State's Attorney, and that the latter, upon learning that they were Federal officers, promptly ordered them into custody—for these reasons, it is argued, the right of removal must be denied.

It is submitted that this argument is unsound. It is undisputed that the indictment is for an alleged murder which, *if committed by the defendants*, was committed by them while performing their duty, during the course of a lawful search and

seizure. But their amended petition makes no admission that they killed Wenger, whether in self-defense or otherwise.

The absence of such an admission, it is submitted, is immaterial with respect to the right of removal. A Federal officer may be taken from his duties and put to trial in a possibly hostile court, and the functions of the Federal Government may be harassed or impeded, by an indictment for something which the officer never did, as well as by an indictment for something which he did in self-defense. The officer is as much entitled to make his defense in the *Federal* court on the theory that he never did the act, as he is on the theory that he did it under justification. He is not required to disclose the details of his defense before trial, save in so far as it is necessary to establish the right of removal. To require an admission by him, under oath, in his petition for removal, that he did the act charged, would be unprecedented. Such a requirement, it may well be argued, would be a violation of the privilege against self-incrimination. In the language of common-law pleading, a *traverse* will suffice to warrant removal. It is not necessary to put in a *plea in confession and avoidance.*

The case upon which the State of Maryland principally relies, on this point at least, is *Illinois* v. *Fletcher,* 22 Fed. 776. In that case removal was sought of a prosecution for murder, arising out of an election riot in Chicago. The defendants were

deputy marshals of the United States. In their petition for removal, they set forth at length their theory as to how the deceased had been shot, adding a denial that they had shot him. The Circuit Court, denying their petition, said (22 Fed. at p. 778):

> If the petition simply averred that the defendants stood indicted in the state court for an act done by them as deputy marshals, or under color of their office, or the law authorizing their appointment and defining their powers and duties, without describing the act or circumstances under which it was committed, it would, perhaps, be the right and duty of this court to assert jurisdiction of the case; at least, until it should appear that the claim was unfounded. *Tennessee* v. *Davis,* 100 U. S. 257.
>
> It is charged in the indictment that the petitioners shot and murdered William Curnan on the 4th day of November, 1884, in the county of Cook and state of Illinois, and the petition distinctly asserts that " neither of them fired any shot or did any act by reason of which the said Curnan came to his death, as set forth in the indictment." If they neither did the shooting nor in any way contributed to Curnan's death, it follows that they have not been indicted for an act or acts done by them as deputy marshals of the United States, and this court has no right to interfere with the jurisdiction of the state court.

The indictment in that case arose out of an arrest for breach of the peace, which the defend-

ants, *as Federal officers,* had no right to make. In making it, they were acting merely as private citizens and could not claim that they were acting under color of their office or of the Federal laws. This fact alone serves to distinguish that case from the case at bar. And the petition for removal in *Illinois* v. *Fletcher* on its face disclosed facts showing clearly that no right of removal existed.

In so far as *Illinois* v. *Fletcher* holds that admission of the act charged is an essential allegation in every petition for removal, it has twice been disapproved in subsequent decisions.

In *Alabama* v. *Peak,* 252 Fed. 306, the defendant, a Federal narcotic inspector, was indicted in the State court for the larceny of $175 in currency from one Lenford. His petition for removal set forth that he had been investigating violations of the revenue laws and was on his way back to report to his superior when he met Lenford; that Lenford afterwards claimed he had been robbed; and that the defendant had been arrested and indicted on Lenford's complaint. The petition added (252 Fed. at p. 307):

> but petitioner emphatically denies that he was on said occasion, or any other occasion, guilty of any act of grand larceny of the felonious taking of Lenford's or any one else's money; but that the whole course of his conduct and acts on said occasion was in the performance of his official duties as aforesaid.

The court held this petition sufficient to warrant removal and denied a motion by the State to remand the prosecution, saying (252 Fed. 306, 309):

> It seems to me, therefore, that the petition is sufficient under the terms of the decision relied on by the state of Alabama; but I can not pass the question without stating that I am not at all satisfied with the correctness of the position taken by the court in *State of Illinois* v. *Fletcher*, that nothing short of a positive averment that petitioners did the act for which they stand indicted, and did it in the line of their duty as deputy marshals of the United States or under color of their authority as such officers, will entitle them to the removal of the case from the state court to this court for trial.
>
> It is true that the terms of the act as written give the right of removal when a suit or criminal prosecution is commenced against a revenue officer on account of any act done under color of his office. I do not, however, concede that the accused must necessarily admit the doing of the specified act in the terms as charged in the state indictment. I think that he has just as much right, if whatever act he did was under color of his office, to have the benefit of a trial of the facts in the federal court as well as to try the question of the intent with which these acts were done.

In *Oregon* v. *Wood*, 268 Fed. 975, the indictment charged five Federal Prohibition Agents with the crime of involuntary manslaughter. The petition

for removal *denied the killing,* and stated that the petitioners, at the time of the acts charged, were "acting as such officers and under color of their office." The court held this to be sufficient, saying (268 Fed. at p. 979):

> Further criticism of the petition consists in the argument that, as it is represented that petitioners did not kill Hedderly, the representation is tantamount to a denial of doing the very act for which they now claim protection, and therefore it was incumbent upon petitioners to show a justification of their act; that is, that it was done under color of their office as revenue officers of the United States. There is a fallacy in the reasoning in two particulars: First, the petition does show that the act was done under color of their office as revenue officers; and second, it may well be that petitioners did not kill Hedderly, but nevertheless they are indicted for killing him, and the essential allegation for the purposes of this inquiry is that the act charged against them was done under color of their office. Their real defense will come later. *State* v. *Peak, supra.*

It is submitted that the reasoning in both of these cases is sound. To establish the right of removal, the petition need not state that the accused officer has done the acts for which he stands indicted. It need only set forth, to the satisfaction of the District Court, that at the time of the alleged crime he was acting under color of his office or under authority of the law; and it must allege that

the prosecution is for acts alleged to have been done in the performance of his duty.

In the proceedings for removal, Congress has not made it necessary for the accused officer to disclose before trial his complete defense to the indictment. Nor has Congress required him to adduce full evidence showing a complete justification of his official acts. It is enough, in the words of the statute, to show that the prosecution arises

> on account of any act done under color of his office or of any such law.

Acts done " under *color* of office " may very well prove insufficient to establish a complete justification. The phrase " color of office " covers a claim which may later turn out to be groundless, as well as a claim which full investigation shows to have been well founded. Indeed the former meaning is probably the more usual one.

> *Bouvier,* L. D., s. v. *Color of Office.*
> *Virginia* v. *De Hart,* 119 Fed. 626.
> *Griffiths* v. *Hardenbergh,* 41 N. Y. 464, 469.
> *Wilson* v. *Fowler,* 88 Md. 601, 605.

Similarly, the phrase " color of law " applies as well to claims which prove, on examination, to be groundless, as to those which are well founded. *McCain* v. *Des Moines,* 174 U. S. 168, 175.

For the purposes of removal, a *color* of official capacity or of legal justification will suffice. The statute does not require absolute and detailed *proof* of all the attendant circumstances before removal

can be granted. It requires only a fair showing that the officer was acting at the time in the *probable* course of his duty. This Court declared, in *Tennessee* v. *Davis,* 100 U. S. 257, 261:

> But the act of Congress authorizes the removal of any cause, when the acts of the defendant complained of were done, *or claimed to have been done,* in the discharge of his duty as a Federal officer. *It makes such a claim a basis for the assumption of Federal jurisdiction of the case, and for retaining it, at least until the claim proves unfounded.* (Italics ours.)

Whether the officer was in fact acting in the course of his duty, and if so, whether the evidence will establish a complete defense, are questions which can be answered only at the trial. To require the defendant to plead and to prove his innocence in the removal proceedings is to impose a burden not intended by Congress, and not warranted by the language of the Act. It is submitted that the petition for removal in the case at bar was amply sufficient to warrant the action of the District Court, and that further pleading or proof was unnecessary.

IV

The decision of the District Court granting the petition for removal, and denying the motion to remand, was an exercise of lawful judicial discretion, and can not be controlled by mandamus.

It is undisputed law that the writ of mandamus will lie to compel an inferior tribunal to hear and to decide a case, but not to compel it to decide in a

particular way. This was the rule of the common law; and it has been the rule of this Court since the earliest times.

In *United States* v. *Lawrence, Judge,* 3 Dall. 42, 53, this Court declared—

> * * * we have no power to compel a judge to decide according to the dictates of any judgment, but his own.

In *Ex parte Bradstreet,* 8 Pet. 588, 590, Chief Justice Marshall stated:

> We have only to say, that a judge must exercise his discretion in those intermediate proceedings which take place between the institution and trial of a suit; and if in the performance of this duty he acts oppressively, it is not to this court that application is to be made.

Cf. *Ex parte Taylor,* 14 How. 2, 12; *Ex parte Secombe,* 19 How. 9, 15; *Ex parte Newman,* 14 Wall. 152; *Ex parte Cutting,* 94 U. S. 14, 20; High, Extraordinary Legal Remedies (3rd ed.), S. 149.

In the case of *In re Rice,* 155 U. S. 396, 403, this Court said:

> The writ of mandamus can not be issued to compel the court below to decide a matter before it in a particular way, or to review its judicial action had in the exercise of legitimate discretion. The writ can not be issued to perform the office of an appeal or writ of error, *even if no appeal or writ of error is given by law.* (Italics ours.)

Cf. *Ex parte Roe,* 234 U. S. 70, 73, and cases there cited; *Ex parte Slater,* 246 U. S. 128, 134;

Ex parte Chicago, Rock Island and Pacific Railway, 255 U. S. 273, 275.

In *Ex parte Hoard,* 105 U. S. 578, it was laid down that when the trial court has denied a motion to remand a cause which has been removed from the State court, mandamus will not lie to compel a remand. And since the decision in *Ex parte Harding,* 219 U. S. 363, the rule in *Ex parte Hoard* has been uniformly applied to all disputed removals of *civil* causes. In such cases the decision of the District Court either granting or denying a motion to remand is not reviewable by mandamus.

It is true, as counsel for the State of Maryland point out, that an exception may perhaps be recognized with respect to the removal of *criminal* causes. And in three cases this Court has granted mandamus to compel the remand of criminal cases wrongfully removed from the State courts.

Virginia v. *Rives,* 100 U. S. 313.
Virginia v. *Paul,* 148 U. S. 107.
Kentucky v. *Powers,* 201 U. S. 1.

But it must be noted that in each of these cases the petition for removal upon its face clearly showed that no grounds for removal existed. The record in each case demonstrated the lack of jurisdiction of the Federal court. In such cases, assumption of jurisdiction is, of course, wholly unwarranted, and may be corrected by mandamus. But, on the other hand, where the jurisdiction of the lower court is doubtful, the remedy by mandamus will be refused. *Ex parte Muir,* 254 U. S. 522.

In *Virginia* v. *Rives,* 100 U. S. 313, the two petitioners (negroes) were under indictment in the State court for murder. They sought and obtained removal under Rev. Stats. 641, on the ground that the State had deprived them of equal rights by excluding all negroes from the *venire.*

The State then petitioned for mandamus to compel remanding of the prosecution; and this Court granted the writ. The reason for the decision was plain. It was clearly shown that the *laws* of Virginia did not in any case exclude negroes from jury panels. Such exclusion was merely the unauthorized practice of local officials. This Court held that the protection afforded by Rev. Stats. 641 extended only to cases where there had been a denial of equal rights by the *law* of the State. Denial of equal rights by the wrongful practice of State officials, (unauthorized by law) furnished no ground for removal. The petition of the accused negroes, therefore, on its face failed to disclose any possible ground for removal, and the Circuit Court had no possible ground for assuming jurisdiction.

Kentucky v. *Powers,* 201 U. S. 1, was a case very similar to *Virginia* v. *Rives.* The case arose out of a bitter partisan conflict between two claimants for the governorship of Kentucky. The facts are set forth at length in the opinion below. 139 Fed. 452. Powers, the accused, had killed Goebel, the Democratic claimant to the governorship, and had been pardoned by Taylor, the Republican claimant. At a previous trial the State court had refused to

recognize the pardon, presumably on the ground that Taylor was not the lawful governor. Powers petitioned for removal under Rev. Stats. 641 and 642, alleging discrimination against him in respect of his equal rights under the Constitution. The facts upon which he relied were chiefly: (1) the failure of the State court at the previous trial to recognize his pardon; and (2) the action of local officials in making up a jury panel composed entirely of "Goebel Democrats," strongly biased against him.

This Court again pointed out that where discrimination is due, not to a State statute, but to illegal or corrupt acts of State officials, unauthorized by statute, no right of removal exists. The remedy is by proceedings in the State court, and ultimately by writ of error from the Supreme Court of the United States. The petition for removal on its face showed nothing to warrant removal, and for this reason mandamus was granted.

Virginia v. *Paul,* 148 U. S. 107, is the only case where this Court has granted mandamus to remand a prosecution against a Federal officer. That decision was upon a point altogether different from the points involved in the case at bar. In *Virginia* v. *Paul,* one Carrico, a deputy marshal of the United States, had been arrested for murder on the warrant of a justice of the peace. He petitioned for removal, on the ground that he had committed the killing in self-defense while "acting by and under the authority of the internal revenue laws."

His petition was granted. At the time the petition was filed, Carrico had been arrested but had *not* been indicted.

This Court granted mandamus to compel the remanding of the cause, upon the ground that no prosecution had been "*commenced*" at the time removal was sought. A prosecution for murder in Virginia was held to be "*commenced,*" within the meaning of the removal statute, only by the finding of an indictment, and not by the issuance of a warrant of arrest. Until the indictment is found, there is no "prosecution" to remove. The Circuit Court was therefore without any jurisdiction to order removal upon the petition filed in that case.

It is manifest that none of the three decisions just cited is applicable to the case at bar. Not one of those decisions turned upon the sufficiency of allegations as to the official capacity of the accused, or as to the fact that the indictment was for a crime committed in the course of his duty. The lower court in each case was clearly shown to have acted beyond its jurisdiction. Federal jurisdiction was not merely doubtful; it was non-existent. And for that reason mandamus was granted in each case.

In the case at bar it is submitted that the District Court had ample facts before it upon which to base its assumption of jurisdiction. And in assuming jurisdiction upon the facts thus before it that court exercised its lawful judicial discretion. Upon the

amended petition for removal and the motion by the State to quash and remand, the court was called upon to decide mixed questions of law and of fact. The motion to quash and remand, it must be noted, directly traversed allegations of fact contained in the amended petition. It denied the allegations contained in paragraph 2 of that petition, as to the official capacity of the defendants (Exhibit A to petition for mandamus, at pp. 29, 36), and an issue of fact was thereby raised, for the decision of the District Court. It is submitted that the decision of the District Court upon the questions here before it was final. As this Court said in *Tennessee* v. *Davis,* 100 U. S. 257, 261 (already quoted, *supra,* p. 27):

> But the act of Congress authorizes the removal of any cause, when the acts of the defendant complained of were done, *or claimed to have been done,* in the discharge of his duty as a Federal officer. *It makes such a claim a basis for the assumption of Federal jurisdiction of the case,* and for retaining it, at least until the claim proves unfounded. (Italics ours.)

It is submitted that the assumption of Federal jurisdiction in this case was a lawful judicial act, amply warranted by the record before the District Court. *Virginia* v. *Felts,* 133 Fed. 85; *Virginia* v. *De Hart,* 119 Fed. 626.

The writ of mandamus is an extraordinary remedy. Its purpose is to correct clear errors of jurisdiction, not errors of discretion.

If jurisdiction is clear, or even if jurisdiction is doubtful, the writ will not lie. *In re Cooper,* 143 U. S. 472, 506, 509; *Ex parte Muir,* 254 U. S. 522.

It is submitted that in the case at bar there is no reason for the use of this extraordinary remedy or for interference with the lawful jurisdiction of the District Court. Even on the unwarranted assumption that error has been committed, it would be at most an error of judicial discretion upon an issue of law *and fact,* and mandamus will not lie to correct it.

CONCLUSION

It is therefore respectfully submitted that the rule should be discharged and that the petition for a writ of mandamus should be denied.

WILLIAM D. MITCHELL,
Solicitor General,

WILLIAM J. DONOVAN,
Assistant to the Attorney General,
Of Counsel for the Respondents.

NOVEMBER, 1925.

APPENDIX

UNREPORTED DECISION HANDED DOWN BY JUDGE FITZHENRY IN THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS ON NOVEMBER 2, 1925.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS, NORTHERN DIVISION.

People of the State of Illinois v. *Walter Moody.* Criminal (3986), No. 313, indictment for assault with intent, etc.

People of the State of Illinois v. *J. E. Asher, Max Hartzig, Walter Moody, John Doe, and Eugene Doe.* Criminal (3987), No. 314, indictment for larceny.

People of the State of Illinois v. *J. E. Asher, Max Hartzig, Walter Moody, John Doe, and Eugene Doe.* Criminal (3988), No. 315, indictment for robbery.

People of the State of Illinois v. *J. E. Asher and Walter Moody.* Criminal (3989), No. 316, indictment for assault with intent, etc.

MEMORANDUM

The September Grand Jury of the Circuit Court of Peoria County returned the indictments here involved. Defendant Walter Moody is a Deputy

United States Marshal in the Southern District of Illinois. The other two defendants were Federal prohibition agents, appointed and acting under and by virtue of the provisions of the National Prohibition Act. On the —— day of October, 1925, defendants filed their petitions, reciting the indictments in the State Court and averring, at the several times in question they were in and about the performance of their official duties, one as Deputy United States Marshal serving processes and the others aiding in the service of the processes in the performance of their official duties in and about the enforcement of the Prohibition Law, and asking that the causes be removed from the Illinois Circuit Court to the United States District Court. Upon a consideration of these petitions the Court granted the writ of habeas corpus cum causa in each of the cases. The Clerk of the Peoria County Circuit Court complied with the writ and transmitted to the Clerk of this Court certified copies of the several indictments in the causes. All of the defendants appeared and gave bond in this Court, in the said several sums fixed by the Circuit Court of Peoria County, for their appearance in this Court. No appearance was entered by the State's Attorney in the proceedings to remove the causes, but on last Saturday, October 31st, he appeared in Court and in each of the criminal proceedings—Nos. 313, 314, 315, and 316, entered his motion to remand the cause to the Circuit Court of Peoria County. After appearing and furnishing capias bail by defendant Asher and prior to the motion of the State to remand, the death of defendant Asher was suggested and the cause abated as to him.

The chief reasons assigned by the State's Attorney of Peoria County upon which he bases his motions to remand, are as follows:

(1) That the United States District Court has no jurisdiction in the premises.

(2) That the petitions for the writs of habeas corpus cum causa were insufficient and informal.

(3) That the defendants in these cases are not within any of the classes of persons referred to in Sec. 33 of the Judicial Code.

(4) That defendant Moody was not in the performance of his duty as a Deputy United States Marshal at the time of the commission of the alleged offenses.

(5) That defendant Hartzig is merely a Federal prohibition agent and does not come within the provisions of the statute authorizing civil or criminal proceedings instituted in State Courts against them, to be removed to the United States Courts.

All other reasons were eliminated in the argument at the bar.

Ordinarily, the question of jurisdiction can not be raised upon a mere motion to remand. (*Carlyle* v. *Sunset Telephone & Telegraph Co.*, 116 Fed. 896.) However, as such motion is in effect a demurrer to the petition for removal, the Court is disposed to give the matter of jurisdiction consideration.

The State does not contend that Sec. 33 of the Judicial Code is unconstitutional, nor can it do so inasmuch as the United States Supreme Court held it valid many years ago. *Tennessee* v. *Davis*, 100 U. S. 257, 25 L. Ed. 648.

The only serious question presented is as to whether or not the defendants in the criminal cases

are persons coming within the classes of persons granted the right of removal in cases of this character. All proceedings in this Court involving the indictments herein are predicated upon Sec. 33 of the Judicial Code of the United States, which provided, in so far as material here, the following:

> When any * * * criminal prosecution is commenced in any court of a State against any officer appointed under or by authority of any revenue law of the United States * * * on account of any act done under color of his office or any such law, * * * and affects the validity of any such law, or against any officers of the courts of the United States for or on account of any act done under color of his office or in the performance of his duties as such officer * * * the said suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the district court next to be holden in the district where the same is pending upon the petition of such defendant to said district court. * * *
>
> The cause shall thereupon be entered on the docket of the district court and shall proceed as a cause originally commenced in that court. * * * When it is commenced by capias or other similar form of proceeding by which a personal arrest is ordered, he shall issue a writ of habeas corpus cum causa, a duplicate of which shall be delivered to the clerk of the State court * * * by the marshal of the district or his deputy * * *; and thereupon it shall be the duty of the State court to stay all further proceedings in the cause, * * *, and any further proceedings, trial or judgment therein in the State court shall be void.

It will be observed that when a defendant by appropriate petition brings himself within the provisions of this statute, practically no discretion remains in either the United States Court or the State Court with reference to the further disposition of the case in question. In such circumstances it becomes the duty of the United States Court to act and it is expressly provided that any further proceedings, trial or judgment in the State Court shall be void.

Sec. 33, *supra,* here involved, grew out of the nullification statute when South Carolina attempted to make it unlawful for revenue officers to collect revenue under a famous tariff act. The State contended it had the right to nullify the tariff law and attempted to do so by legislation. In the many years that followed its application became frequent and it has been amended several times, only, however, by increasing the classes of persons embraced within its provisions. The latest amendment was in 1916, when the provision, " or against any officer of the courts of the United States for or on account of any act done under color of his office or in the performance of his duties as such officer," was added.

It is contended very earnestly on behalf of the State of Illinois that because defendant Hartzig is a Federal prohibition Agent, appointed and acting under the National Prohibition Act, that therefore he is not such a revenue officer as is contemplated in Sec. 33 aforesaid. The State relies principally upon two District Court decisions, *Smith* v. *Gilliam,* 282 Fed. 628, and *Wolkin* v. *Gibney,* 3 Fed. (2nd) 960. In *Smith* v. *Gilliam,* which was an exhaustive opinion remanding a murder case to

the State Courts of Kentucky, the defendants were prohibition agents. The question as to whether the National Prohibition Law was a revenue law within the meaning of Sec. 33 was presented, but the petitioning defendants contended it made no difference whether the National Prohibition Act was a revenue law, or not, for the reason that Sec. 28 of the National Prohibition Act gave them (the defendants there) all of the power of protection of revenue officers. Sec. 28 is as follows:

> The commissioner, his assistants, agents and inspectors, and all other officers of the United States, whose duty it is to enforce criminal laws, shall have all the power and protection in the enforcement of this act or any provisions thereof which is conferred by law for the enforcement of existing laws relating to the manufacture or sale of intoxicating liquors under the law of the United States.

Because the statute just referred to did not contain some special provision showing an affirmative intent on the part of Congress to embrace the right of removal, the District Court there held that Sec. 28 did not apply and that the cases had been improperly removed and therefore should be remanded. The learned judge who wrote the opinion made an elaborate investigation of the "law for the enforcement of existing laws relating to the manufacture or sale of intoxicating liquors under the law of the United States" and set out in the opinion a digest of all of the statutes conferring power and protection to revenue agents and officers. All of these various provisions of the law were referred to except Sec. 33 of the Judicial Code.

In South Carolina revenue collectors and agents had been arrested upon criminal charges for attempting to collect customs taxes and it seems clear to this Court that the original conception of the statute was to furnish protection against possible unwarranted criminal prosecutions in the State Courts and was in its nature the very essence of protection to those engaged in that service at that time. There are many cases in the books where the rights given to revenue officers under Sec. 33 have been invoked as a protection to them in the performance of their duties in many of the jurisdictions of the United States.

In *Tennessee* v. *Davis,* 100 U. S. 257, the defendant there was indicted in the State Court for murder. A petition was filed in the United States Circuit Court, asking that the cause be removed for trial. The sitting judges of the Circuit Court were not in agreement upon the power of the Circuit Court to remove the murder case from the State Court to the Federal Court and submitted that question to the United States Supreme Court. The Supreme Court in that case answered the question of the Circuit Court as to the power of removal in the affirmative and held that the Circuit Court did have the power. The Supreme Court, in passing upon the question, said:

> A more important question can hardly be imagined. Upon its answer may depend the possibility of the General Government preserving its own existence. As was said in *Martin* v. *Hunter,* 1 Wheat. 363, " The General Government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers." It can act only through its officers and agents,

> and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in the State Court for an alleged offense against the law of the State, yet warranted by the federal authority they possess, and if the General Government is powerless to interfere at once *for their protection;* if their protection must be left to the action of the State Court; the operations of the General Government may at any time be arrested at the will of one of its members. The legislation of a State may be unfriendly. It may affix penalties to acts done under the immediate direction of the National Government, and in obedience to its laws. It may deny the authority conferred by those laws. The State Court may administer not only the laws of the State, but equally federal law, in such a manner as to paralyze the operation of the government. And even if, after trial and final judgment in the State Court, the case can be brought into the United States Court, for review, the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledged federal power arrested.

It will thus be seen from this discussion that the statute which is now known as Sec. 33 of the Judicial Code, is in its essence a measure of protection. Protection to not only the Government itself, but to the officers and agents through which it acts. Sec. 33 was a part of the existing law at the date of the passage of Sec. 28 of the National Prohibition Act. Until the passage of the National Prohibition Act, or the War Prohibition Act, which it

amended, all laws relating to the manufacture and sale of intoxicating liquors enacted by Congress were purely revenue laws and their enforcement and the collection of the excise taxes were committed to the Bureau of Internal Revenue and the law was administered by revenue collectors and agents. And in the course of the administration of these revenue laws there were many cases where revenue agents were attacked and it was found necessary in self-defense to shoot to protect themselves. In many of these cases the local authorities instituted criminal proceedings against the revenue agents growing out of these unfortunate affairs. In some of the localities it was apparent there were hostile communities and public officers in sympathy with those who were violating the law and whose criminal conduct brought about the unfortunate affairs upon which criminal prosecutions were predicated, and, as a matter of protection, the criminal cases were removed for trial to the Federal Court. This was the history that was before Congress at the time of the enactment of the National Prohibition Law. I can not agree with the learned Court of the Western District of Kentucky that it was not the clear intention and purpose of Congress to give to Federal prohibition agents all of the protection in the performance of their duties that prior thereto had been given to revenue officers, and one of the many elements of protection given to those officers was the right to have criminal prosecutions instituted against them in State Courts while they were in and about the performance of their duties as Federal prohibition agents, removed to the United States Court for trial.

The other authority relied upon by the State is that of *Wolkin* v. *Gibney, supra.* In that case the

learned judge who wrote the opinion, bases his conclusions upon the case of *Smith* v. *Gilliam, supra,* and *Lipke* v. *Lederer,* 259 U. S. 557. The latter case was cited as holding "The Federal Prohibition Act is not a revenue act." In that case Justice McReynolds, who wrote the opinion for the Court, simply held that the double penalty to be assessed by revenue collectors under certain circumstances was invalid because that particular tax was in truth and in fact a penalty.

By the 18th Amendment to the Constitution the Congress and the States were given concurrent power to enforce the provisions of the prohibition section of the Amendment. It was within the power of the Congress to do so by any species of law it saw fit. If for reasons satisfactory to Congress it concluded to enact a revenue law that would enforce the provisions of the prohibition amendment, it was within the power of that body to do so, and in doing so instead of providing for the enforcement of the law in the Department of Justice, it concluded to do so through the Treasury Department and the Bureau of Internal Revenue. The act expressly directs that the Commissioner of Internal Revenue and his assistants, agents and inspectors shall investigate and report violations of the law to the United States Attorney, who is charged with the duty of prosecuting offenders, etc. Sec. 35 recognizes as a part of the legislation all existing revenue laws and at the same time repealed all existing laws to the extent of their inconsistency with the National Prohibition Act. Title III is devoted almost entirely to tax and revenue matters upon liquor whose possession, sale and use may be lawful.

The law authorizes the sale of intoxicating liquor for use upon the prescription of physicians. Of course the purpose of the National Prohibition Law is to prevent as far as possible the manufacture and sale of intoxicating liquors as a beverage, but at the same time taxes the legitimate manufacture and use of intoxicating liquors. The taxing features of the National Prohibition Act and the existing law which is made a part of it by inference, may be only incidental, and yet that fact of itself would not have the effect to change its character from that of a revenue law.

This same contention was urged upon the United States Supreme Court in *United States* v. *Doremus,* 249 U. S. 86, as the reason why the Harrison Narcotic Drug Act (Act of December 17, 1914, c. 1, 38 Stat. 785, U. S. Comp. Stat. 1916, Sec. 6287–g) should be declared unconstitutional by it. It was there contended that the narcotic business might properly be regulated by the States in the exercise of their police powers and that the States had never delegated that power to the Federal Government. It is admitted by everybody that the revenue features of the Harrison Narcotic Drug Act are but incidental to the real purpose of the act. Yet the Supreme Court held " The act may not be declared unconstitutional because its effect may accomplish another purpose as well as the raising of revenue. If the legislation is within the taxing authority of Congress—that is sufficient to sustain it." And yet the validity of that act could only be sustained upon the theory that it was a revenue act.

In the application of Sec. 28 the District Court for the Southern District of New York followed

the case of *Smith* v. *Gilliam, supra,* without comment.

The solution of the question as to whether the National Prohibition Act is a revenue act is unnecessary to the proper determination of the issues here raised, because regardless of whether the Prohibition Law is a revenue law, or not, those who are charged with its enforcement are granted all of the power and protection afforded revenue officers who were engaged in the enforcement of the liquor laws prior to the passage of the Prohibition Act, by Sec. 28.

In all four of these cases it happens that the Grand Jury of Peoria County in the indictments joined Walter Moody, one of the Deputy Marshals of this district. As to him, the provisions of the law are very clear and positive and I do not understand that counsel for the State is seriously challenging his right to invoke the privilege of removal granted by Sec. 33 to "any officer of the courts of the United States." A deputy marshal is so far an officer of the court that he is subject to removal by the court at pleasure. Rev. Stat. Sec. 780, U. S. Comp. Stat. 1916, Sec. 1304.

The petitions upon which these causes were removed are sufficient in form. *State of Tennessee* v. *Davis,* 100 U. S. 257; 25 L. Ed. 648.

The several motions to remand will be denied.

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